No. 2785

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

O. E. GERNERT,

Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF APPELLANT

Writ of Error to the District Court of the United States for the District of Oregon

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CASES CITED IN THIS BRIEF.

BRIEF OF APPELLANT.

Writ of Error to the District Court of the United States for the District of Oregon.

The appellant, O. E. Gernert, appeals from a judgment of the District Court of Oregon sentencing him to four months' imprisonment in the county jail of Multnomah County, for a violation of Section 37 of the Penal Code, in conspiring with Frank Menefee, F. M. LeMonn, B. F. Bonnewell, H. M. Todd, Oscar A. Campbell, Thomas Bilyeu and others to devise a scheme and artifice to defraud by the use of the mails.

STATEMENT OF THE CASE.

After a trial which lasted from the 8th of July to the 20th day of August, 1915, of which time not more than half a day was occupied by giving of testimony against him, the appellant was convicted. He brings this appeal because he is firmly convinced that throughout the case he was compelled to bear the burden of the misdeeds of others, of the misrepresentations of others, of the fraud that was practiced by the managing officers of the United States Cashier Company, for which he was but a mere employee, of misrepresentations and misdeeds of which he had neither knowledge or notice, of facts of which he was in total ignorance.

Because of that firm belief he has declined to join with the other defendants in their appeal. Their acts were not his acts, their representations were not his representations, their guilty knowledge was not his knowledge, their fortunes should not be his, and he earnestly prays this court that in judging whether he has had a fair and impartial trial, and whether error was committed as to him, that he be judged by his acts alone.

He comes before Your Honors not invoking technicalities in order that a guilty man may escape, but that before this tribunal, removed from the atmosphere of passion and prejudice which swayed and governed the trial in the court below, he may have and obtain justice.

It is the fact as the record discloses, and as the Government will not deny, that the lack of patents, that the facts as to the financial statements, that the facts relative to the value of the patents, that the facts relative to Oviatt's machine, that the facts relative to putting the Cashier Company's machines on the market, that each and every fact which the Government contends rendered the stock of the U. S. Cashier Company valueless, and its purchase a delusion and a snare, were as unknown to the appellant, O. E. Gernert, as they were to the public which read the advertisements and which invested in this costly toy.

Gernert was not an executive officer of the company, he was not a member of the Board of Directors, he had nothing to do with the books, or with the factory, or with the patents, he was solely a stock salesman, and all the knowledge he had came to him from the executive officers, and from the literature which the Company issued.

THE INDICTMENT.

The indictment charges that the defendants conspired to devise a scheme and artifice to defraud to be effected by means of the postoffice establishment of the United States and to obtain money and property by means of false and fraudulent representations and promises.

It alleges that this fraud was to be accomplished in the following manner: A corporation was to be formed, and its stock sold to investors who should be induced to purchase the stock in the following manner:

1. By inserting advertising matter in newspapers, pamphlets, catalogues, circulars, letters and by oral representations that;

2. The United States Cashier Company owned patents to the following described machines:

a. Change Computing Machine.
b. Bank Cashier.
c. Lightning Change Maker.
d. Currency Paying Machine.
e. New Style Adding Machine.

3. That the company was engaged in the business of manufacturing and selling said machines.

4. That on account of the patents and the alleged manufacture and sale of the machines the shares of stock of the corporation were of great commercial value and large dividends would be paid thereon.

5. That the United States Cashier Company would declare and pay large and certain dividends within six months from the date of the purchase of said stock from any of the defendants or the corporation.

6. That the company was the owner and in the possession of large bona fide orders for the purchase of said machines.

7. That by reason of said orders the company would make a large profit.

8. That the financial condition of the company was excellent.

9. That the assets of the corporation far exceeded in value the total amount of liabilities.

10. That a large amount of the stock of the corporation, which should be offered for sale to the investors belonged to and was the property of the corporation and that the money derived from the sale would be by the corporation invested and used in such a manner as to increase the assets of the corporation, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines.

11. That the assets of the corporation were so much greater than its liabilities that the defendants were justified in raising and increasing the sale price of said shares of stock from par value (which was $10.00) up to $30.00 and $50.00.

The indictment thereupon proceeds to negative all of those representations and alleges that they were false

and that the stock was in truth and in fact worthless, and that the defendants knew that the representations were false and that the stock was of little or no value.

The indictment is based upon the theory that the stock was worthless and by reason of that fact the investors and the general public were defrauded. Such was the fact, and there is little doubt that they were so defrauded. But it is self-evident that if the stock had been of the value that the United States Cashier Company claimed it was, and had paid the dividends that the president and sales manager claimed would be paid, the investors would not have been defrauded and no case under the Federal laws would have resulted.

THE GOVERNMENT ALLEGES A CONSPIRACY TO DO THE THINGS SET OUT IN THE INDICTMENT. It is therefore incumbent upon it to establish that the defendants and each of them conspired and had in mind the particular scheme to defraud alleged in the indictment and that it should be carried out in the manner set forth therein.

Before the United States was entitled to submit the liberty and reputation of the defendant O. E. Gernert to the jury, it must first prove that he was possessed of knowledge of the facts which the Government avers rendered the stock worthless and that he knew that the representations relative to those facts were false.

No man could possibly be held to have conspired to devise a scheme to defraud unless he knew the facts which rendered the scheme fraudulent and which made the stock worthless. *This the Government failed to do.*

There is *no testimony* in the record even *tending* to show that O. E. Gernert had knowledge or notice, or even suspected any of the following conditions:

a. That the company did not have the patents to the machines which it was building and advertising, *but on the contrary the managing officers of the company assured him in writing that such was the case.*

b. That the company was not engaged or intending to engage in the *bona fide* business of manufacturing and selling those machines, *but he was continually informed by the managing officers that the manufacture and sale of the machines was but a matter of a few weeks.*

c. Or that the patents which the company in fact owned were infringements on prior patents or were otherwise worthless, *but on the contrary he was sent and shown letters from patent attorneys to the effect that the patents were good.*

d. Or that the Gernert made any representations that the company would pay dividends which other defendants said they would, or that he suspected that the company would not pay such dividends, *but on the contrary he was given literature setting forth the dividends paid by similar companies and was assured that the U. S. Cashier Company would do likewise.*

e. Or that the defendant Gernert represented to anyone that the company would commence paying dividends within six months from any purchase of its stock.

f. Or that he knew that the company was not in possession of large bona fide orders for its machines,

but on the contrary he was informed by Menefee and LeMonn that such was the case.

g. Or that he knew that the company would not make large profits, *but was continually informed by his superior officers that it would.*

h. Or that Gernert knew that the financial condition of the company was bad or that its liabilities greatly exceeded its assets, *but he was repeatedly given the same information that was given the other stockholders.*

i. Or that he knew or suspected that the assets did not exceed in value the total amount of liabilities, *but he was continually informed that they did.*

j. Or that he knew that the financial condition of the company did not justify the raises in the price of its capital stock, but on that subject as on the others the same representations were made to Gernert that were made to the other investors in the company.

In other words the United States totally failed to show that the defendant Gernert had any knowledge of the very matters which it claims rendered the stock worthless and which he must have known if he conspired to defraud the public by such means.

The United States did, however, show that Gernert made one trip, and only one trip, during which he sold some of his personal stock to several people in the Yakima Valley, upon representations that the stock was company stock when it was in fact his own. That is the sum, substance and limit of the Government's proof.

ASSIGNMENT OF ERRORS.

O. E. Gernert, defendant in the above-entitled action, and plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a Writ of Error from this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence made and entered in said cause, against said plaintiff in error, and petitioner herein, now makes and files with his said petition the following assignment of errors herein upon which he will rely for a reversal of said judgment and sentence upon the said writ, and which said errors, and each and every of them, are to the great detriment, injury and prejudice of the said defendants and in violation of the rights conferred upon him by law; and he says that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the District of Oregon there are manifest errors in this, to-wit:

I.

That the Court erred in admitting in evidence against the defendant, O. E. Gernert, Government's Exhibit 293, being a carbon copy of a letter dated Portland, Oregon, February 10, 1912, addressed to O. E. Gernert at Portland, Oregon, as follows:

"Portland, Oregon, February 10th, 1912.

Mr. O. E. Gernert,

Portland, Oregon.

Dear Sir:—

In reference to our understanding in regard to your selling stock in California territory, will say that we will make you the following proposition: You are to work in the territory from San Francisco south toward Los Angeles, keeping at a distance from said latter place, so as not to interfere with the territory or work of our Agent there, and you are to have working under you such men as you may mutually arrange for, and after the first advancement to any of the men working under you, no further advancement shall be made to any of them, except through you.

All men working under you shall receive a commission of fifteen (15%) per cent, providing the business done by them shall not equal or exceed the sum of One Thousand Five Hundred ($1,500.00) Dollars per month; twenty (20%) per cent if the business done by them shall exceed One Thousand Five Hundred ($1,500.00) per month and shall not exceed Three Thousand ($3,000.00) Dollars; and twenty-five (25%) per cent if the business done by them in any one month shall exceed the sum of Three Thousand ($3,000.00) Dollars; these commissions to be allowed and rated only on cash business done by each of your men respectively.

On all the business done by your men where settlement is made in paper, and either notes or con-

tracts taken only a fifteen (15%) per cent commission shall be allowed, and no paper shall be taken to run longer than ninety (90) days provided where settlement is made for purchases of stock by note, if you or your agent shall succeed in discounting said note without recourse, so that the proceeds shall be received by us within ten (10) days after the close of the month in which the sale of the stock is made for which said note is taken in settlement, same shall be credited back as cash business for the month in which the subscription was taken. The commissions on settlements made by note or contract or in any manner other than cash, shall only become due and payable when the money is received by us for the sale or collection of said note or contract.

The above terms shall apply to any business done by you personally without the aid or assistance of an agent.

It is understood and agreed that you shall be entitled to receive an over-head commission on all business done by you or your agents of five (5%) per cent, and your commission shall be due and payable as that of the Agents, or in other words, on cash received, or on notes negotiated without recourse or collected.

We will advance to you for your personal expenses the sum of Twenty-five ($25.00) Dollars per week, and pay you in addition to the above commission, a salary of Fifty ($50.00) Dollars per week, it being understood that the Twenty-five ($25.00)

Dollars per week expense money shall be returned to us or deducted from your commissions as earned.

No settlement shall be made by you or any of your Agents on cash business turned in to you or through you to us, except the minimum commission of fifteen (15%) per cent on cash received, which you may retain and pay to the agents as the cash is received by you, and the bonuses or extra commissions, if any shall accrue to any agent, shall only be settled ten (10) days after the close of the month, when the volume of business done by each person working under you, shall be finally ascertained.

It is understood that in all sales made by you or your organization, you shall have the right to turn your own personal stock for one-fourth (¼) of all such sales; that the turning over by you of the stock to the amount of one-fourth (¼) of all of the net proceeds, less your commissions, agents' commissions, and other expenses incurred in the selling of the stock which you shall dispose of.

In consideration of allowing you to dispose of one-fourth (¼) of the stock handled by you, from your personal stock, you are to bear one-fourth (¼) of the expense of your own salary, sales commissions, and other expenses, it being understood that our agreement to pay to you the salary mentioned, and advance to you the money as above stated, is to be considered only as a loan to the extent of the advancement of the Twenty-five ($25.00) Dollars per week, and one-fourth (¼) of your salary.

With reference to all notes taken by you, it is understood that you shall, where you leave same with a local bank for collection, take a receipt from said bank, particularly describing the note, the returns and commissions to be allowed for the collection and so deposit the same that the proceeds will be at once accounted for and remitted to the undersigned by said bank.

Yours faithfully,

No. 3.
F.M.:MM

over the objection of the defendant Gernert.

II.

The Court erred in overruling an objection of the defendant Gernert to the following testimony of the witness Oviatt on his direct examination:

"That he had devised the principles of a coin paying and (in the summer of 1909) had gone to Mr. Glover, a public engineer with a view to having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results, and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas, and Bilyeu was to proceed with the development and put it into work-

ing shape, and build a model. That the witness had disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod, so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position. That Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided sixty per cent to the witness and forty per cent to Bilyeu, and that was agreeable to witness, and that they shook hands on it. That Mr. Bilyeu said to him, 'I will take you out to my model maker,' which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin and said that the witness had been associated with Mr. Potter in the development of the machine, and had not been treated properly by Mr. Potter; that witness had devised a machine of his own and arranged with Bilyeu to develop it, and wanted Overlin to undertake the manufacture of a model; that Mr. Overlin accepted, and they returned to town. That Mr. Bilyeu advertised for a draftsman, and put him to work in the Ainsworth Building; that the model was constructed and that a month or six weeks after that time Mr. Bilyeu said to the witness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for wit-

nesses to make a better machine, and that Mr. Bilyeu said he could not do it. That the witness went east the 2nd day of May, 1910, and went first to the Comptograph Company, with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine. That he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910; that the second model was completed in 1912."

The witness was then shown photographs of the exterior of the machine, and identified them as photographs taken in August, 1910, and of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company.

II A.

That the Court erred in permitting the witness to testify relative to and demonstrating the latest Payograph machine to the jury over the objection of the defendant Gernert as follows:

Q. Will you take that machine and demonstrate it to the jury? (Witness proceeds to demonstrate.) Tell the jury what the machine is and what it is designed to do, and what it will do.

A. This machine here is not my invention, this machine is a stock adding machine made by the Wales Company in Wilkesbarre, known as the Adding Machine Company. This coin paying device is

my invention and is connected to this adding machine, so that when the key is depressed here and this handle of the adding machine operated the money is ejected here into the hand or envelope; it is listed on the paper of the adding machine here, and is added on the wheels of the adding machine here. The connect and disconnect is at this point. There is a large operating lever. (Operating machine.) This is simply a connecting link from the coin paying mechanism to the adding machine. By taking out that thumb screw you disconnect all of the pay mechanism so that you can list and add without paying money, or without ejecting money, but when that link is attached by that thumb screw, then the operation of the adding machine also operates the paying machine over here, so that when you put down a key here and pull your handle, that amount will be ejected over here to the hand or envelope, recorded on the paper here and added on the wheels here. Whenever you wish to add and list without paying, as I have said before, take this thumb screw out and you at once have separated your adding and paying mechanism, or the machine can be lifted bodily from this and the adding machine taken off to other parts of the office and used independently of this.

Q. In other words, the machine is so constructed that you can use the adding machine with or without the coin paying mechanism?

A. Yes, sir.

Q. And they are detachable?

A. Detachable, yes.

Q. And so arranged that by the manipulation of this screw or device on the end of the machine the adding machine either will or will not work in conjunction with the coin paying mechanism?

A. That is right.

Q. In other words, to make it plain, if you are using the adding machine as such, by handling it in the manner you have described, you could mark the number of figures by depressing the proper keys indicating the proper amounts, and that would add into the adding machine, without working the coin paying mechanism at all.

A. Yes, sir.

Q. And then by replacing that screw, the adding machine would perform exactly the same work, and in addition to that the proper amount of change would be paid out of the coin paying mechanism?

A. That is right.

Q. Now, what is the feature of novelty about that arrangement and about that machine—what is the main feature of novelty?

A. The ability to separate the adding mechanism from the paying mechanism is one of the principal objects.

Q. Now, to what sort of adding machines can this coin paying mechanism be attached?

A. This coin paying mechanism has been attached to the Wales machine, to the Burroughs machine, and can be adapted to and attached to any regular type of adding machine.

Q. Do I understand you then that in the marketing of the machine you could simply sell the frame of the coin paying mechanism and they would connect it on to the regular adding machine, without the necessity of purchasing an adding machine?

A. This one here could be. This one would have to be taken into the shop and the key stems extended; that one there is a stock machine connected with the other machine.

Q. The machine you have been demonstrating now is the first model?

A. That is the first model.

Q. Have you the latest model of the payograph machine?

A. This is the latest model.

Q. Now, demonstrate to the jury the latest model.

A. This here is what is termed the Burroughs Visible Adding Machine; this here is the payograph with the extension or mezzanine keyboard, so that when you depress a key here you set the mechanism not only for the paying but also for the adding machine beneath, and pressing the corresponding key of the adding machine; then when you operate the handle here you not only list and add on the adding machine, but you pay that amount over here; this can operate independent on this, that is the adding machine independent of the coin paying, simply by changing this button on this side. With it in position it would pay, list and add; with the button

turned that way, it would add, list, but would not pay. Then this machine, the adding machine, can be taken out bodily from beneath and used as an ordinary adding machine about the office the days they don't wish to pay off.

Q. Now, what is the feature of novelty in that machine, Mr. Oviatt?

A. The principal feature is the same as in that, ability to separate your adding mechanism from your paying mechanism.

Q. You claim to be the inventor of any part or portion of the adding machine?

A. No.

Q. What adding machine do you use in connecting your machine to it?

A. We are using right here the Burroughs.

Q. What is the reason, the main reason, for simply connecting your machine to it, instead of making an adding machine of your own?

A. Well, there are many reasons. One reason is that we don't care to go into an experimental field and take our chance to patent suits with the adding machine companies. We also wish to avoid the expense incidental to the manufacture of adding machines. We get the support of the adding machine company and salesmen rather than their non-support. Furthermore, any company as a rule which has employees enough to warrant the using of a paying machine of this type already owns an adding machine. They pay off once a week as a rule, and by attaching to the adding machine which they

already own they are saved the expense incidental to buying a complete adding mechanism, which we might otherwise have to devise and build into the machine.

Q. In other words, a company to whom you might want to sell already owning an adding machine would not have to buy the complete outfit?

A. No.

Q. Now to what machines, Mr. Oviatt, can you —to what sorts of adding machines and kind of adding machines can the payograph be attached, and from which it can be detached?

A. We can attach to the Wales, Burroughs, White, made in New Haven, Connecticut, to the Universal; that is owned by the Burroughs. That is practically all of the machines in the market having the ordinary type of keyboard.

Q. What is the fact as to whether or not the adding machines you have mentioned are the principal adding machines that there are being manufactured and sold in the United States?

A. There are only two principal adding machines, that is the Burroughs and the Wales, at the present time. The White in New Haven hasn't attained very much publicity.

Q. Now is it—this machine that you have demonstrated before the jury, this last machine, Mr. Oviatt that is in interference with the machine of the United States Cashier Company, known as the Bank Cashier?

Mr. Pipes: Now, may it please the court, that still raises the question.

Mr. Reames: I won't insist upon it until I present my point."

To the overruling of said objection the defendant Gernert was duly and regularly allowed an exception.

III.

That the Court erred in admitting in evidence over the objection of the defendant Gernert, as proof of the overt acts alleged in the indictment each and every of the letters set out in the indictment as overt acts numbers one to sixteen, inclusive:

Mr. Reames: I am now about to offer in evidence Government's Identification 115, which forms the basis of overt act No. 1, a letter written by Mr. Bonnewell. I have a stipulation with Mr. McHenry to the effect that the letter was written by Mr. Bonnewell and mailed, and I want him here before I introduce it.

Mr. Maguire: Before the Government offers in evidence any evidence of overt acts, I would like at this time that the Court require the United States Attorney to declare whether he elects to prosecute these defendants for a violation of Section 37 of the Penal Code, or for a violation of Section 215 of the Penal Code. The indictment is drawn in such a general manner that there will be difficulty in determining whether it is a violation of Section 37, or a violation of Section 215, and in order that the de-

fendants may preserve the record, it seems to me at this time we are entitled to know from the District Attorney upon which section he elects to proceed.

Mr. Reames: As stated in my opening statement to the jury and as stated in the indictment itself, this is an indictment for a violation of Section 37 of the Penal Code.

Mr. Maguire: Does the United States Attorney contend that the various overt acts set out in the indictment were the overt acts referring to, and in pursuance of the particular conspiracy set out in that indictment?

Mr. Reames: Yes.

Mr. Maguire: Refer to no other.

Mr. Reames Yes, the ones attempted to be proven at this time.

Mr. Maguire: There have been offered and received numerous exhibits from Exhibit 120 to Exhibit 272, consisting of letters purporting to have been signed and mailed by the United States Cashier Company and by Mr. LeMonn as its sales agent, and Mr. Menefee as its president. Do I understand that it is the contention of the Government that these letters were written and mailed in the United States mail?

Mr. Reames: Yes.

Mr. Maguire: That is a matter of record now, so we may proceed and rely upon it?

Mr. Reames: Yes. The evidence of the Government has offered as to the manner in which these exhibits came into our possession, and the Government now claims it is proved by circumstantial evidence that these letters and various exhibits referred to by counsel were written and mailed in the United States mail in the ordinary course of business.

Mr. Maguire: And were mailed and relate to and refer to the particular conspiracy set out in the indictment?

Mr. Reames: Yes.

Mr. Maguire: And were in execution of that particular conspiracy?

Mr. Reames: I think so. The next is Government's Identification 212. That is the one identified by the witness Klein as having been received by him in New York City.

Mr. Pipes: No objection to the identification on our part.

Mr. Reames: Then may we have the admission that on July 23, 1912, Mr. Frank Menefee, either deposited or caused to be deposited this letter of date July 23, 1912, in the United States mails at Portland, Oregon, and at that time it was enclosed in an envelope, and had its postage fully prepaid?

Mr. Pipes: Yes.

Mr. Reames: The Government then offers in evidence letter of date July 23, 1912, Government's

Identification 212, identified by the witness E. Klein when he was on the stand, as having been received by him at New York City, a few days after July 23, 1912, and the Government offers it as forming the basis of Overt act No. 2.

Mr. Maguire: On the part of the defendant Gernert objection is offered to this testimony on the ground that it is not an overt act for the purpose of executing the conspiracy set out in the indictment, for the reason that assuming the Government's contention to be true, and the allegations of the indictment to be true, the conspiracy, if any has been fully executed and terminated and performed, at least as early as June, 1911.

Now, may it please the Court, the defendants in this case are charged not with having devised a scheme to defraud, not with violation of Section 215 of the Penal Code, but with having conspired to commit an offense against the United States. The District Attorney has conceded that all the letters which have been offered in evidence, and which he claims, and which of course for the purpose of this argument is admitted, went through the mails, were written and mailed for the purpose of executing the scheme to defraud, which he has set out and alleges to be true, in his indictment. Now, the gist of that offense is not in promoting of the scheme, but it is in the use of the mails to carry out an alleged scheme to defraud. The defendants are charged in this indictment with having conspired and confederated

together to commit that particular offense; that is the offense of placing a letter in the mails for the purpose of executing the particular scheme to defraud set out in this indictment. Now, when that offense, that is, when the objects of the conspiracy have been consummated, there can be no further acts committed by any one, to be charged in the indictment or to be offered or admitted in the evidence, for the crime, if any, has been committed.

COURT: This indictment charges a continuing conspiracy.

Mr. Maguire: Quite so, Your Honor. And under the continuing conspiracy the statute of limitations does not commence to run from the first overt act, but from the last overt act, but it must be an overt act for the purpose of committing the particular offense set out in the indictment. Now, the particular offense set out in the indictment is the use of the mails for the purpose of defrauding, the mailing of a letter, rather, to carry out a scheme set out in the indictment, and the District Attorney says that the scheme had been formed in September, and that these particular letters set out in 1911 and offered in 1911, were for the purpose of executing the scheme. Now, the conspiracy must have existed in the minds of the defendants prior to the devising of the scheme and when that offense was completed or committed, if any at all—of course, I merely assume that for the purpose of this argument, because it is in effect a demurrer to this evidence, and to the

indictment—when that was completed, then there was nothing further to do. Now, let's take this state of facts, that counsel has put in here. He said that these defendants got together in September, 1910, for the purpose of devising and executing a scheme to defraud. Now, that offense was committed, and that conspiracy was consummated, at the time the first letter was placed in the mails for the purpose of executing the scheme. Now, any further acts, any further mailing of letters, were separate and distinct offenses. Any agreement or conspiracy was a separate and distinct conspiracy. Any agreement or conspiracy was a separate and distinct conspiracy, and cannot be joined in the same count of the indictment, and it is a question whether they are permissible to be charged in the same indictment, and unquestionably that cannot be done in the same count of the indictment. Therefore, under the District Attorney's own admission these particular letters did not refer to completing and committing an offense, if any offense at all was committed.

Argument of Counsel.

COURT: I understand your position, and I don't think it is necessary to take up any more time on it. I have ruled on that question a good many times, and as long as the indictment charges a continuing offense, as it does in this case, I think it is competent for the Government to give in evidence any act that may be selected by it as an overt act, providing it has charged a continuing conspiracy,

and I don't think the first overt act terminates the conspiracy so the objection will be overruled.

MR. MAGUIRE: Save an exception.

MR. PIPES: That applies also to all the other defendants.

COURT: The same objection goes to all the defendants, and an exception.

Whereupon, the United States of America offered in evidence each and every letter set forth in the indictment as overt acts being therein numbered as overt acts I to XVI, to the admission of each of which for the reason hereinbefore set forth the defendant Gernert duly made objection, which objection was overruled by the Court. To the action of the Court in overruling said objection and in admitting said letters in evidence as proof of the overt acts set out in the indictment, the defendant Gernert was allowed an exception.

IV.

That the Court erred in refusing to grant defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert, for the reason that the indictment does not state facts sufficient to constitute crime.

V.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to Defendant

Gernert, for the reason that the indictment charges more than one crime.

VI.

That the Court erred in denying and overruling the defendant Gernert's motion to the Court to direct jury to return a verdict of not guilty as to the defendant Gernert for the reason that there is no evidence tending to show formation of any conspiracy described in the indictment.

VII.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that the evidence does not show any confederation, agreement or conspiracy on the part of the defendant Gernert with the defendants named in the indictment.

VIII.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to defendant Gernert for the reason that the evidence showed that the conspiracy, if any, was terminated and completed more than three years prior to the finding of the indictment.

IX.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that upon the face of the record

it appears that none of the overt acts which appear in the indictment were committed prior to the termination of the conspiracy and effectuating its said object.

X.

That the Court erred in overruling and denying the defendant Gernert's motion to the Court to direct the jury to return a verdict of not guilty as to the defendant Gernert for the reason that it appeared from the face of the record that the defendant Gernert was not associated with the conspirators named in the indictment nor employed by the United States Cashier Company within three years of the finding of the indictment.

XI.

That the court erred in denying and refusing to give the following instruction #3 requested by the defendant O. E. Gernert

> "Again, even though you should find from the evidence that fraud or injury resulted from the acts of one or more of the defendants and was brought about or executed in whole or in part by use of the mails, yet, if you would not find that there was an agreement or understanding between the defendants and all of them to devise such a scheme and to execute it in the manner hereinbefore alleged, then you must find the defendants not guilty."

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XII.

That the Court erred in denying and refusing to give the following instruction #4 requested by the defendant O. E. Gernert:

> "Gentlemen of the Jury: You are further instructed that it is not sufficient for the government in this case to show that certain of the defendants combined to perform certain acts and some one or more combined with others to perform different acts, even though the defendants had a similar purpose in view, but the evidence in this case must show beyond a reasonable doubt that each and all of the defendants agreed and conspired together to do these things."

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XIII.

That the Court erred in denying and refusing to give the following instruction #6 requested by the defendant Gernert:

> "The existence of a conspiracy cannot be established as to one of the defendants by the acts or declarations of another defendant committed in his absence and without his knowledge or concurrence, nor can the connection of a particular defendant to a conspiracy be established or proved by what is said or done by another person alleged

to be a co-spirator. Therefore, in determining whether or not there was a conspiracy and whether or not any particular person was a party to such conspiracy you are limited to the things done by him, and unless you find beyond a reasonable doubt from his debts that he had an intent to defraud and that he had knowledge that the Company did not have, own or control the patents which it claimed to have and that he knew the Company did not intend to manufacture such machines (if you find from the evidence it was not their intention so to do) and that he knew that the Company did not have bona fide orders for its machines and that he knew that the Company would not make large profits and that he knew that the financial condition of the Company was not excellent but was insolvent and that the liabilities of the corporation greatly exceeded its assets and that he knew that the stock by reason of these things was worthless. In other words the government has alleged in the indictment that the stock in this corporation was worthless by reason of certain alleged facts and conditions which it sets out in detail, and before you can find any particular defendant guilty under this indictment it will be necessary for you to find beyond a reasonable doubt that such defendant knew that the stock of the Company was worthless because of the particular matters which the government charges.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XIV.

That the Court erred in denying and refusing to give the following instruction #7 requested by the defendant O. E. Gernert:

> "The mere fact that any one of the defendants may have made statements which were false or misleading in order to induce others to purchase stock in this corporation, would not of itself justify you in finding him guilty of the crime of conspiracy as charged in this indictment unless you further find that the defendant made such statements knowing that the stock he was offering for sale was worthless."

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XV.

That the Court erred in denying and refusing to give the following instruction #8 requested by the defendant:

> The mere assertion by a salesman that certain stock offered for sale was Company stock instead of personal stock would not justify you in finding such salesman guilty of the crime charged in this indictment. There is no difference between Com-

pany stock and personal stock, it is all stock in the United States Cashier Company, and if such salesman at the time of making such representations did not know or have knowledge of the matters which the government alleges rendered said stock worthless, but believed said stock to be valuable, then no presumption of fraudulent intent would arise and said defendant would not be guilty of the crime charged and you should find such defendant not guilty.

The defendant then and there duly and regularly excepted to the action of the Court in refusing to give said requested instruction.

XVI.

That the Court erred in denying and refusing to give the following instruction #10 requested by the defendant Gernert:

> You are further instructed that so far as the stock salesmen were concerned they were and are not officers of the Company and they stood in no fiducial relation toward its stockholders or toward such persons as it might be their duty in the course of their employment to endeavor to induce to purchase stock of the Company, and such salesmen had the right to freely contract with the Company and had the right to obtain the best contract they could for themselves without being guilty of fraud or wrong doing, and the mere fact, if you shall find it to be a fact, that they received a large commission,

is not of itself any evidence of fraud or wrong doing on their part. They had a right to place whatever value they might desire upon their services and to obtain and make the best bargain they could with their prospective employers. The business of selling stock in a corporation or obtaining subscriptions to the same is a legitimate business and there is no presumption or suspicion of any kind against a man who engages in such business.

Exaggeration or puffing of the value of an article or enterprise does not constitute a crime and is not criminal or fraudulent unless the person making such statements intends thereby to defraud the purchaser.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XVII.

That the Court erred in denying and refusing to give the following instruction X-A requested by the defendant Gernert:

There is no presumption from the fact that a statement is false that it was made with a fraudulent intent.

Southern Devp. Co. v. Silva, 125 U. S. 248.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XVIII.

The Court erred in denying and refusing to give the following instruction #XI requested by the defendant Gernert:

> It is incumbent upon the government to show that the representations or statements made by any one of the defendants were not only untrue but that the defendant knew them to be untrue, and in addition to those two elements intended thereby to injure and defraud.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XIX.

The Court erred in denying and refusing to give the following instruction #XII requested by the defendant Gernert:

> There is no presumption of fraud from the fact that a glittering and glowing promise may have been made and not carried out, unless it shall appear that the person who made such promise knew at the time of making the same that it could not be carried out and would not be carried out.

The defendant then and there duly and regularly excepted to the action of the court in refusing to give said requested instruction.

XX.

That the Court erred in charging the jury as follows:

> The indictment charges that the alleged fraudulent scheme was to be carried out and executed by certain specific false representations. It is not incumbent upon the government to prove that all of the means set out in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that any of them were actually used or put into operation. It is sufficient if it be shown to your satisfaction, beyond a reasonable doubt, that the conspiracy was entered into for the purposes indicated, and that one or more of the means described in the indictment were to be used to execute it, and that, during the continuance of the conspiracy, the alleged overt acts, or some one or more of them, stated in the indictment were done by one or more of the conspirators to effect the object thereof.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXI.

That the Court erred in charging the jury as follows:

> In order for one person to defraud another, it is not necessary that he should bear any malice or ill-will toward such person. If the defendants in this case agreed together that they were to sell the

shares of stock in this corporation upon and on account of false and fraudulent representations, which they would make knowing these representations would be false and untrue, and knowing that they would be made for the purpose of deceiving the investors and the public as to the true condition and value of the shares of stock, then the law would imply that they intended to defraud all of the persons who should buy shares of stock from them, or from the Cashier Company, relying upon such representations.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXII.

The Court erred in charging the jury as follows:

It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises, if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate

intent to make the business of the corporation a success, or the ultimate belief of the defendants that they would finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXIII.

That the court erred in charging the jury as follows:

In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business of the corporation a success, or how confident they may have been that they would be able to return that money without loss, or without profit, because the representation which they would have agreed to make would be for the purpose of getting the money in a wrongful way and they could not, un-

der such circumstances make them rightful by pointing to some ultimate good intent.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception is allowed by the court.

XXIV.

That the Court erred in charging the jury as follows:

> The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful and his intent to pay it back without loss cannot cancel the wrong. So in this case if the defendant by means of the false and fraudulent representations set out in the indictment agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXV.

That the Court erred in charging the jury as follows:

The law presumes that every man intends the logical and natural consequences of his own wrongful acts. Applying this rule to the case at bar, if you believe from the evidence, and beyond a reasonable doubt, that these defendants agreed among themselves that they would sell to the public and to these investors the shares of stock of the United States Cashier Company, under the false and fraudulent representations set out in the indictment, or some of them, then you would be justified in finding that the defendants agreed to defraud the investors and the public, notwithstanding the fact that you also might believe that the defendant really believed that the value of the stock would be ultimately such as to return to the investors a profit instead of a loss.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the court.

XXVI.

That the court erred in charging the jury as follows:

It is not necessary in this case in order to convict one or more of the defendants that you should be satisfied that each of the defendants knew or understood all of the fraudulent representations, promises or pretenses that were to be made, if any were to be made, if one of the defendants at any time prior to the period of three years from the date of filing the indictment and prior to the time when

any overt act set out in the indictment was committed agreed with another of said defendants that they would act jointly in carrying out the alleged fraudulent scheme set out in the indictment, and in selling the stock of the corporation representing that the money to be received from such sale was to go into the treasury of the company to be used by it in building factories, knowing that the shares of stock, which were to be offered for sale, were in truth and in fact the privately owned stock of another of the defendants and that none of the money would go into the treasury of the company, and you further believe from the evidence that some of the false and fraudulent pretences and promises set out in the indictment were to be used by the defendant for the purpose of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell their stock in such manner and under such false representations, were parties to the conspiracy.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXVII.

That the Court erred in charging the jury as follows:

If you believe from the evidence that the original purpose of the defendants was legitimate, and you further believe from the evidence that they believed in the future of the United States Cashier Company

and believed that it would ultimately pay dividends to the investors, and you believe from the evidence and beyond a reasonable doubt that they deliberately agreed together to take advantage of the publice interests between a meritorious invention in order to sell to the public shares of stock by the false and fraudulent representations set out in the indictment, if they were false, then you would be justified in finding that the defendants intended to defraud the persons to whom they should sell such stock.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the Court.

XXVIII.

That the court erred in charging the jury as follows:

In determining whether or not the defendants intended to defraud the investors of the money by selling to them the shares of stock of the corporation, you have a right to take into consideration the question of the commissions which the evidence shows, or tends to show were received by the defendant or any of them, from the proceeds of the sale of this stock.

The defendant duly excepted to the act of the Court in giving the above instruction to the jury, which said instruction was allowed by the Court.

XXIX.

That the court erred in charging the jury as follows:

Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among other things, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of direct or circumstantial evidence, the aid of which is constantly required not merely for the purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, great latitude is allowed in its admission, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered may, by their number and joint operation establish or corroborated by minor circumstances be sufficient to constitute conclusive proof. And where fraud in the purchase or sale of property is in issue evidence of fraud of like character committed by the

same parties at or near the same time, is admissible, on the ground that where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceed from the same motive.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception was allowed by the Court.

XXX.

That the court erred in charging the jury as follows:

The indictment charges that the conspiracy was formed in September, 1910. The date is not material. It is sufficient if it was formed sometime prior to the overt acts charged in the indictment and continued and in existence at the time of such acts.

The defendant duly excepted to the act of the court in giving the above instruction to the jury, which said exception was allowed by the Court.

POINTS AND AUTHORITIES.

I.

The mailing of each letter for the purpose of executing the scheme or artifice to defraud is a separate and distinct offense under Section 215 of the Penal Code.

In Re Henry, 123 U. S. 372, 374.
Re DeBara, 179 U. S. 320.

II.

A separate count charging a conspiracy to violate the statute may be predicated upon each letter mailed to execute the scheme or artifice described in the indictment.

Francis vs. U. S., 152 Fed. 155.

III.

Separate and non-concurrent sentences may be given on each count charging a conspiracy and based upon each letter mailed.

Francis vs. U. S., supra.

IV.

The crime charged in the indictment is not a violation of Section 215, Penal Code, but of Section 37, viz.: a conspiracy to commit a crime against the United States.

V.

A separate charge of conspiracy could have been predicated upon each overt act discribed in the indictment and each count would have been a complete offense. The indictment therefore charges sixteen separate and distinct crimes.

VI.

The stipulation of the United States Attorney that the letters written in 1910 and 1911 were written and mailed for the purpose of executing the PARTICULAR conspiracy charged in the indictment is an election and establishes the fact that the crime charged was committed more than three years prior to finding of the indictment.

VII.

Likewise the overt acts set out in the indictment could not have been committed for the purpose of executing the conspiracy, which, under the United States Attorney's stipulation an election had already been consummated.

U. S. vs. Ehrgott, 182 Fed. 267, 273.

VIII.

No act can be construed to be an overt act which takes place after the termination of the conspiracy charged in the indictment.

Lonabaugh vs. U. S., 179 Fed. 476, 478, 481.
Ex parte Black, 147 Fed. 832, 834.
U. S. vs. Burke et al., 218 Fed. 83, 84.

IX.

It is error for the trial court to invade the province of the jury and assume the existence or non-existence of disputed facts.

1 Blashfield on Instr. to Juries, 234.

X.

The question of the intent of the defendants, their belief in the success of the enterprise, and as to whether the representations made were false and fraudulent were all disputed questions of fact. The court, in instructing the jury, assumed that they had been established by the Government and removed them from the consideration of the jury.

XI.

In closely contested cases it is error for the trial court to refuse to give the instructions which present the defendant's theory of the law and the case.

Burton vs. U. S., 196 U. S. 283, 306, 307.

XII.

The testimony of the witness Oviatt was incompetent as to anyone other than Bilyeu. Gernert objected to the same, his objection was overruled, and an exception allowed. Afterward the court directed the jury to find Bilyeu not guilty. The testimony there-

upon became inadmissible and incompetent, but it was permitted to go to the jury. This constitutes error.

Boyd vs. U. S., 142 U. S. 450, 457, 458.

XIII.

It was not necessary that the defendant Gernert request the court to instruct the jury that the Oviatt testimoney was not to be considered by them. His exception and the ruling of that court on the admission of the testimony was not thereby waived.

Boyd vs. U. S., supra.

XIV.

In the United States court when error is apparent in the record it is presumptively injurious to the party against whom it was committed unless it appear that the error did not and COULD NOT prejudice the rights of the party.

Williams vs. U. S., 158 Fed. 30, 35, 36.
Vicksburg R. R. Co. vs. O'Brien, 119 U. S. 99.
Deery vs. Gray, 5 Wall. 795, 807.
Sprinkle vs. U. S., 150 Fed. 56, 59.
Gilmer vs. Higley, 110 U. S. 47.
Boston &c. Co. vs. O'Reilly, 158 U. S. 334, 337.
McElroy vs. U. S., 164 U. S. 76, 80, 81.

XV.

The submission to the jury for consideration of extraneous issues or evidence which is neither relevant or material to the question upon trial is a violation of the defendant's rights and constitutes error.

Sparks vs. Terr. of Okl., 146 Fed. 371, 373.

XVI.

There is no testimony that the defendant Gernert knew any of the facts and conditions which rendered the stock worthless or that he knew of the existence or confederated in any conspiracy.

XVII.

Whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed. An inference cannot be based upon an inference.

Manning vs. Ins. Co., 100 U. S. 693, 697.
U. S. vs. Ross, 92 U. S. 281, 284.
State vs. Hembree, 54 Ore. 463.

XVIII.

Proof of the existence of a criminal intent on the part of the defendant Gernert was an essential element of the Government's case. In refusing to give defendant's

requested instructions VI, VII, VIII the court committed error.

People v. Wiman, 148 N. Y. 29, 32, 33.
People v. Wiman, 92 Sup. Ct. N. Y. 320, 330, 331, 332.

XIX.

Unless the Government's evidence is such as to exclude every reasonable hypothesis but that of guilt, the defendant is entitled to a verdict of not guilty.

U. S. vs. Richards, 149 Fed. 433.

XX.

The legal presumption is that the defendant was innocent of the crime charged and this presumption remains with him until removed by proof beyond a reasonable doubt of his guilt.

Union Pac. Coal Co. vs. U. S., 173 Fed. 737, 740.

XXI.

Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial

evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment of conviction.

Union Pac. Coal Co. vs. U. S., 146 Fed. 121, 123, 124;
U. S. vs. Richards, 149 Fed. 443, 454;
Hayes vs. U. S., 169 Fed. 101, 103;
U. S. vs. Hart, 78 Fed. 868, 873, 84 Fed. 826, 828;
U. S. vs. Martin, 26 Fed. Cas. 1183;
People vs. Ward, 105 Cal. 335, 341;
People vs. Murray, 41 Cal. 66, 67;
State vs. Hunter, 50 Kans. 302;
Bradshaw vs. State, 17 Neb. 147;
Duff vs. U. S., 185 Fed. 101, 102.

ARGUMENT.

The errors of which the defendant Gernert complains group themselves into three divisions.

1st. Those which go to indictment, and the overt acts which are charged therein.

2nd. Those which relate to the instructions of the court relative to the matter of fraud, and criminal intent.

3rd. Those which discuss the sufficiency of the evidence against the defendant Gernert.

The nature of the crime charged.

The defendants are not charged with having devised a scheme or artifice to defraud. They are charged with having conspired to commit an offense against the laws of the United States, namely to violate Section 215 of the Penal Code. This difference is real and not imaginary. If two men conspire to defraud another the conspiracy is continuous until the time that the fraud is accomplished. If, however, they conspire to commit an offense against the laws of the state their conspiracy has been consummated the very moment that the offense is committed.

The defendant Gernert contends

1. That inasmuch as the defendants are charged with having conspired to violate Section 215 of the Penal Code, that the offense was consummated the very instant that a letter was placed in or taken out of the mails.

2. That the mailing of each letter was a separate and distinct offense, and that the agreement, if any of the defendants to mail each letter was a distinct conspiracy.

3. That when the United States Attorney informed the defendant Gernert and the Court that the letters written in 1910 and 1911 were written and mailed by the defendants for the purpose of executing the *particular* conspiracy charged in the indictment; that such statement was an election on his part, relieved the defendants from the burden of offering any proof of that nature, made inadmissible the proof of the letters charged as overt acts in the indictment (which were all written later than December 31st, 1911), and established that as to the particular conspiracy charged in the indictment the statute of limitations had already run.

The authorities on this subject are clear on these points.

> "We have carefully considered the argument submitted by counsel in behalf of the petitioner, but are unable to agree with him in opinion that there can be but one punishment for all the offenses committed by a person under this statute within any one period of six calendar months. As was well said by the district judge on the trial of the indictment, 'the act forbids, not the general use of the post office for the purposes of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet, or the taking out of a letter or packet from the post office in the

> furtherance of such a scheme. EACH LETTER SO TAKEN OUT OR PUT IN CONSTITUTES A SEPARATE AND DISTINCT VIOLATION OF THE ACT.' It is not, as in the case of In re Snow, 120 U. S. 274, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated."
>
> IN RE HENRY, 123 U. S., page 372, (374).

It must inevitably follow therefore that if the mailing of each letter is a separate and distinct offense, that an agreement to commit such offense is a violation of section 37 of the Penal Code, and the defendants could be prosecuted for an offense for each time they mailed or received a letter, and that a separate count for conspiracy would lie for each letter so mailed or received.

If, however, the position taken by the trial court and the United States Attorney is the correct one then it must follow that where the letters all relate to one general scheme to defraud, there could only be one conspiracy to mail such letters, only one count in the indictment, and only one sentence imposed.

Unfortunately, however, the courts have passed upon the matter, as the following citation discloses, and it is not open to argument.

> "BUFFINGTON, Circuit Judge. This is a writ of error sued out by Stanley Francis to the District Court for the Eastern District of Pennsylvania. In that Court Francis was indicted with

others under Rev. St. Par. 5440 (U. S. Comp. St. 1901, p. 3676), on three indictments, each containing three counts, for conspiracy to commit an offense against the United States prohibited by Rev. St. Par. 5480 (U. S. Comp. St. 1901, p. 3697), as amended. The allegation in substance was that Francis and others, composing the Storey Cotton Company, conspired to devise a scheme to defraud persons by correspondence by inducing them to remit funds to invest in supposed cotton speculations, which speculations had in fact no existence. * * *

"On the trial the government withdrew two counts, and Francis was convicted on the remaining seven. The court imposed sentences upon him aggregating five years, divided as follows: Under indictment 44, two years; on the first count of No. 46, two years, to commence at the expiration of sentence No. 44; on the second count of No. 46, one year, to commence at the expiration of the sentence on the first count at No. 46. The sentence was to the Eastern Penitentiary. Thereupon Francis sued out this writ. The question raised under the various assignments may be considered under four heads, viz.: First, the legality of the counts under which sentence was imposed; second, the application of the statute of limitations; third, the testimony of one Quinlan; fourth, the legality of the sentence.

"With reference to the first question, it will be noted that in re Henry, 123 U. S. 373, 8 Sup. Ct. 142, 31 L. Ed. 174, followed in Re De. Bara, 179

U. S. 320, 21 Sup. Ct. 112 (45 L. Ed. 207), it was held:

" 'The act (section 5480) forbids, not the general use of the postoffice for the purpose of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet, or the taking out of such a letter or packet from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.'

"Now the counts here in question are each based on a letter mailed to a different person. Such mailing is a separate act, and, being done in pursuance of a scheme to defraud, constitutes an offense under section 5480. Such being the fact, it follows that a conspiracy to do that act was a conspiracy to commit an offense against the United States. This brings the case within the letter and spirit of section 5440, and warrants a charge of conspiracy to commit that particular offense. That act and offense constituting the basis of a conspiracy to commit it, it follows that an indictment therefor will not shield from indictment a conspiracy of the same person to commit another additional and separate offense, although of a like general kind, against the United States, the wording and spirit of section 5440 require such construction to fulfill its intent. We hold, therefore, that each of the counts before us covers a conspiracy indictable under section 5440."

FRANCIS v. U. S., 152 Fed. 155.

In order that the Court may not lose sight of the record in this regard we quote as follows:

"Mr. Reames: I am about to offer in evidence Government's Identification 115, which forms the basis of overt act No. 1, a letter written by Mr. Bonnewell. I have a stipulation with Mr. McHenry to the effect that the letter was written by Mr. Bonnewell and mailed, and I want him here before I introduce it.

"Mr. Maguire: Before the Government offers any evidence of overt acts, I would like at this time that the Court require the United States Attorney to declare whether he elects to prosecute these defendants for a violation of Section 37 of the Penal Code, or for a violation of Section 215 of the Penal Code. The indictment is drawn in such a general manner that there will be difficulty in determining except by the number put at the top of the indictment whether it is a violation of Section 37 or a violation of Section 215, and in order that the defendants may preserve the record, it seems to me at this time we are entitled to know from the District Attorney upon which section he elects to proceed.

"Mr. Reames: As stated in my opening statement to the jury and as stated in the indictment itself, this is an indictment for a violation of Section 37 of the Penal Code.

"Mr. Maguire: Does the United States Attorney contend that the various overt acts set out in

the indictment were the overt acts referring to, and in pursuance of the particular conspiracy set out in that indictment?

"Mr. Reames: Yes.

"Mr. Maguire: Refer to no other?

"Mr. Reames: Yes, the ones attempted to be proven at this time.

"Mr. Maguire: There have been offered and received numerous exhibits from Exhibit 120 to Exhibit 272, consisting of letters purporting to have been signed and mailed by the United States Cashier Company and by Mr. LeMonn as its sales agent, and Mr. Menefee as its president. *Do I understand that it is the contention of the Government that these letters were written and mailed in the United States mail?*

"Mr. Reames: *Yes.*

"Mr. Maguire: That is a matter of record now, so we may proceed and rely upon it.

"Mr. Reames: Yes. The evidence of the Government has offered as to the manner in which these exhibits came into our possession, and *the Government now claims it is proved by circumstantial evidence that these letters and various exhibits referred to by counsel were written and mailed in the United States mail in the ordinary course of business.*

"Mr. Maguire: AND WERE MAILED AND RELATE TO AND REFER TO THE

PARTICULAR CONSPIRACY SET OUT IN THE INDICTMENT?

"Mr. Reames: YES.

"Mr. Maguire: AND WERE IN EXECUTION OF THAT PARTICULAR CONSPIRACY?

"Mr. Reames: I THINK SO."

(Abstract of Record, pp. 261, 264).

It is therefore apparent that during the course of the trial the United States stipulated with the defendant that the letters, Exhibits 120 to 272, (all written more than three years prior to the finding of the indictment) were written by the defendants, mailed by them in the mail in the regular course of business, and were written and mailed for the purpose of executing the particular conspiracy set out in the indictment. *In other words* THEY WERE OVERT ACTS FOR THE PURPOSE OF EXECUTING THE CONSPIRACY, AND

Section 215 of the Penal Code was violated as separate and distinct offenses every time one of those letters were placed in the mail.

And inasmuch as the offense charged is that the defendants conspired to violate Section 215, and the Government had stipulated in open court that the letters written in 1910 and 1911 were written for the purpose of executing the PARTICULAR conspiracy charged in the indictment, it is equally apparent, that the object of the conspiracy, (which was to violate Section 215)

had already been accomplished some years back of the statute of limitations.

It is hornbook law that no overt act can be charged or proved which took place after the object of the conspiracy had been accomplished. And where the object of the conspiracy charged is the violation of the law of the United States, there can be no overt act after the particular statute has been violated.

> "The defendants are clearly right in saying that the overt act cannot succeed the completion of the contemplated crime, and here the crime contemplated would have been completed as soon as the goods once got clear of the warehouse in Brooklyn, if I am right about the scope of section 2987."
>
> U. S. v. EHRGOTT, 182 Fed. 267 (273).

> "But the dates of the several acts here cited were such that no overt act occurred within three years of the finding of the indictment, unless the issuance of the patents by the officers of the Land Department at Washington or some of the acts subsequently done by one or more of the defendants can be regarded as such an act.
>
> "At the conclusion of the evidence, the defendants severally requested the Court to direct a verdict of acquittal upon the ground that the case made by the evidence was one the prosecution of which was barred by the statute of limitation. The request

was denied for reasons indicated in United States v. Lonabaugh (D. C.) 158 Fed. 314, exceptions were reserved, and the ruling is now assigned as error.

"The statute defining the offense is Rev. St. Par. 5440 (U. S. Comp. St. 1901, p. 3676), which reads:

" 'If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years or to both fine and imprisonment in the discretion of the court.' "

"And the statute of limitation in Rev. St. Par. 1044 (U. S. Comp. St. 1901, p. 527), which declares:

" 'No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed.'

"While the gravamen of the offense is the conspiracy, the terms of section 5440 are such that there also must be an overt act to make the offense complete (Hyde v. Shine, 199 U. S. 62, 76, 25 Sup.

Ct. 760, 50 L. Ed. 90); and so the period of limitation must be computed from the date of the overt act rather than the formation of the conspiracy. And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. Lorenz v. United States, 22 App. D. C. 337, 387; s. c. 196 U. S. 640, 25 Sup. Ct. 796, 49 L. Ed. 531; Ware v. United States, 84 C. C. A. 503, 154 Fed. 557, 12 L. R. A. (N. S.) 1053; s. c. 207 U. S. 588, 28 Sup. Ct. 255, 52 L. Ed. 353; Jones v. United States, 89 C. C. A. 303, 162 Fed. 417, s. c. 212 U. S. 576, 20 Sup. Ct. 685, 53 L. Ed. 657. * * *

"Applying these decisions to the present case, it is plain that the title passed from the United States when the patents were executed and were recorded in the office of the recorder of the General Land Office at Washington, and that neither a physical delivery of them nor any further act was essential to make them perfect or effective. And recalling what has been said about the possession and the right of possession, we think it also is plain that the object of the conspiracy was effected when the title passed from the United States, and therefore, that what was done thereafter was not done to effect that object. * * *

"It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in the sense of the statute, is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured. See United States v. Keitel, 211 U. S. 370, 391, 20 Sup. Ct. 123, 53 L. Ed. 230."

LONABAUGH v. UNITED STATES, 179 Fed. 476, 478, 481.

"The facts of the case of Ex parte Black (D. C.) 147 Fed. 832, and 160 Fed. 431, 87 C. C. A. 383, relied upon by the demurrant, show that the payments relied upon by the government in that case as overt acts were made after the conspiracy had

been fully completed, and could not, therefore, have been to effect its object. In that case the object of the conspiracy was to effect a fraudulent entry of public lands. The acts essential to the conspiracy were the successive steps necessary to be taken in the land office to complete the entry. These steps had been taken and the entry completed long before the payments relied upon as overt acts were made. The statute of limitations had barred the acts constituting the entry, and the case was sought to be taken out of the influence of the statute by laying the subsequent payment of money, made after the conspiracy had successfully ended, as an overt act."

UNITED STATES v. BURKE ET AL., 218 Fed. 83, 84.

"The indictment must be read in the light of the facts. When so construed, this indictment breaks down. First, because the subject matter of the alleged overt act appertains to the conspiracy; second, because the alleged overt act took place after the conspiracy had been consummated; third, because the action is absolutely barred by the statute of limitations. * * *

"Second. The undisputed evidence shows that before the 3rd day of April, 1903, the date of the earliest alleged overt act, the conspiracy laid in the indictment had been consummated. There is a strange confusion in the averments of the indict-

ment as to dates and the sequence of events, whereby, upon the face of the indictment, it would appear that by the payment of $200 to John B. Million, one of the entrymen, on the 4th day of April, 1903, he was induced and persuaded to make certain false and fraudulent entries which were 'then and there made,' etc. The witnesses of the government, and the tract book of the Land Office, show beyond dispute that each and every of these preliminary entries was made on the 7th and 8th of October, 1902. So that these entrymen must have been 'persuaded and induced' to undertake this scheme before that date. In like manner it is conceded by the government that the final proofs were made as to each and every of these tracts of land, the consideration thereof paid to the government, final certificates issued, and a conveyance taken from each of the entrymen, on or before the 17th day of March, 1903. Thereby everything was accomplished which was contemplated by the conspiracy, as laid in the indictment. Every step had been taken and had been ratified and approved by the officers of the Land Office, and a transfer secured of the fraudulent titles so acquired. The only overt acts to support the indictment are certain payments made to the entrymen between the 4th day of April and the 13th day of June, 1903, to carry out the agreement made in the preceding September, when they joined the conspiracy.

"AN OVERT ACT PRESUPPOSES A PENDING CONSPIRACY. So that the act of any one done in furtherance of the conspiracy, may

bind all of his associates. WHEN A CONSPIRACY HAS BEEN COMPLETELY EFFECTED, THIS IMPLIED AGENCY DISAPPEARS. Logan v. United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; Brown v. United States, 150 U. S. 93, 14 Sup. Ct. 37, 37 L. Ed. 1010. It is a contradiction of terms to speak of an act done to effect the purpose of the conspiracy after the conspiracy has been accomplished. Such an anomalous doctrine might prolong a conspiracy, and would keep it in active operation until every obligation incurred during the formative period of the plot had been liquidated. In United States v. Donau, 11 Blatchf, 168, Fed. Cas. No. 14,983, the function of an overt act is declared to be 'to show that the unlawful combination became a living active combination.' I believe no case can be found where the overt act postdated the consummation of the conspiracy. Where would be the locus penitentae in such a case? So that, whether you consider the subject matter of the alleged overt act or its date, weeks after the conspiracy had been completed, the indictment discloses a desperate effort on the part of the pleader to confuse the distinction of the law, and to resuscitate a cause of action which, presumably, through the neglect of some one, has been allowed to lapse."

EX PARTE BLACK ET AL., 147 Fed. 832, 839.

The trial court in overruling the objection of plaintiff as to the admission of the proof of the overt acts charged in the indictment, and in denying the motion for a directed verdict, and in arrest of judgment and for a new trial, took the position that the indictment charged a conspiracy which was continuing in its nature, and that therefore the statute of limitations did not commence to run until the commission of the last overt act charged in the indictment.

In taking this position the trial court was in error. That error we believe arose from the fact that the learned judge misapprehended the nature of the conspiracy charged. The cases which he cited in support of his view were cases which involved a charge of conspiring to defraud the United States, or a conspiracy to affect an illegal combination in restraint of interstate commerce. In those cases the Supreme Court of the United States quite logically and correctly held that until the object of those several conspiracies, viz.: until the United States had been defrauded, or as long as the illegal combination was being effected, just so long did the conspiracy continue, and the statute would run from the last overt act.

But in the case at bar the United States Attorney was not content with the broad rules of evidence and doctrines of law which govern trials for violations of Section 215, but aimed at something even more extended and liberal, to-wit: the law of conspiracy. We are quite free to admit that if he had charged the defendants with "devising or attempting to devise a

scheme to defraud," that the statute of limitations would not commence to run until the scheme to defraud had been fully and completely carried out, and that every letter mailed would constitute a separate and distinct defense.

The gist of the offense with which the defendant Gernert was charged was that he conspired to violate section 37 of the Penal Code. The learned judge below lost sight of the fact that the very moment Section 37 was violated the object of the conspiracy was accomplished and the conspiracy terminated.

This was not mere empty, technical error on the part of the Court. If the United States Attorney had placed his offer on other ground, the rights of the defendant Gernert would have been vastly different, and he would have been under other obligation, and it would have been the duty of the Court to have given the Court vastly different instructions. If the U. S. Attorney had offered the evidence of letters, telegrams, circulars, etc., as proof of other conspiracies, tending to show guilty knowledge, intent or motive, the evidence might have been admissible against the defendant committing that act, but it would not have been evidence against his co-defendants, and they would have been entitled to an instruction from the court to that effect. By contending and stipulating that the letters, etc., related to and were in execution of the *particular* conspiracy charged in the indictment be made an election by which both paries were bound.

THE INSTRUCTIONS.

(Assignment XII.) The defendant Gernert complains that the instructions of the learned judge below to the jury on the question of guilty knowledge, fraudulent intent and criminal intent, were erroneous, and were prejudicial to him. It must be conceded that the defendants were guilty of no crime unless it appears that the stock which they were trying to sell was worthless or at least worth far less than the prices which they were selling it for. The indictment charges a conspiracy to devise a fraudulent stock selling scheme. All that the defendants sold or attempted to sell was stock, all the representations which they made, all the advertisements which they published were, so the Government claims, made for the sole purpose of selling stock, and to defraud the public by inducing them to believe that this stock was of great value and would produce large and lucrative dividends.

The very cornerstone of the Government's case must necessarily be that the defendants KNOWING that the stock was or would be worthless yet entered into a campaign for its disposal. Unless the Government demonstrates that the stock was worthless and that the defendants knew that it was worthless, it must be held to have failed in its case.

The defendant Gernert makes no claim but that the managing officers of the corporation, its directors, its president and its sales-manager were possessed of information relative to the company's affairs which rendered fraudulent any act of theirs in selling or attempting to

sell any of the stock. It was amply proven that the defendants Menefee and LeMonn knew that the company did not have the patents which it claimed to have, that the patent which it did have was in interference with another application for patent, that the financial condition of the company was not good, but that on the contrary it was close upon the reefs of insolvency, that the stock was not worth even par, that the orders which they advertised and proclaimed were not of the substantial nature which they represented. It must be conceded, however, that the Government did not offer any proof which even tended to show that the defendant Gernert knew any of those things which contributed to make the stock worthless.

GERNERT NEVER HAD ANY KNOWLEDGE OF THE FACTS WHICH RENDERED THE STOCK WORTHLESS AND ITS SALE A FRAUD.

Does it require argument to demonstrate that he could not have been a member of a conspiracy to defraud when he did not know or suspect the essential elements which taken together made the scheme an artifice to defraud.

It was for these reasons that the defendant submitted the instruction which forms the basis of Assignment of Error XIII. The Court refused to give the instruction and thereby the jury were deprived of the defendant Gernert's defense.

If the Court was right in so doing, it would have been equally correct in telling the jury that a man who honestly believed that the company had patents to all of the machines which it advertised, who honestly believed that those patents were of great value, who honestly and sincerely believed that the company was about to engage in the manufacture and sale of the machines, who was sincerely of the opinion that by reason of the patents and manufacture and sale of the machines the shares of the company would be of great commercial value, and that large dividends would be paid thereon, who honestly believed that the company was the owner and in the possession of large bona fide orders for the purchase of its products, and that by reason thereof it would make a large profit, who was convinced that the financial condition of the corporation was excellent and that its assets greatly exceed its liabilities, to such an extent that the directors were justified in raising the price thereof from par to three times par, yet nevertheless he could be a member of a conspiracy to defraud.

Of course such a proposition would be absurd, yet in refusing to instruct the jury, as requested by the defendant Gernert, the trial court practically told them that.

The same issue arises in Assignments of Error XV and XXVI. The Court's error arose from confusing the doctrine that it is not necessary for every conspirator to know just what every other conspirator is doing or intends to do, with the principle that where one is charged with devising a scheme to cheat and defraud it is necessary and essential to prove that he knew the facts and conditions which made the fraud and cheat a possibility.

It is necessary under this indictment for the United States to prove that the defendant conspired to devise the scheme to defraud there described, and it is absolutely essential that it prove that he knew that the stock was of little or no value.

Again in its instructions the lower court committed grievous error as to this defendant. The Court invaded the province of the jury under the guise of instructing it as to the law, it undertook to remove from the jury's consideration several vital questions of fact.

That this action of the court constitutes highly prejudicial and reversible error should require no citation of authorities, yet in an abundance of caution we respectfully invite Your Honor's attention to the following principles of law as laid down by respectable authorities:

> "It is a legal maxim 'that the court is for the law, and the jury for the fact,' and, as was noted in a previous chapter it is the exclusive province of the jury to determine the facts.
>
> "Accordingly when material facts are in issue between the parties, and the evidence is conflicting as to such issues, it is error and a usurpation of the province of the jury to assume the existence or non-existence of such facts.
>
> "This rule is elementary and familiar, and it makes no difference in the application of the rule whether one fact or several are assumed, or whether the assumption is direct or indirect.

"The court cannot assume the existence of facts if there is room for controversy even where the evidence is slight, although a verdict may be directed where the evidence would not sustain a contrary finding." * * *

"The error in assuming a disputed fact as true is usually prejudicial, warranting reversal, but a different rule prevails where the error is invited by the complaining party, or where substantial justice has been done."

1 Blashfield on Instructions to Juries, 234 et seq. (citing cases.)

The assignments of error referred to include two instructions in one of which appears the following statement:

"It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful?" * *

Now it is urged by the United States Attorney that what the court should have said was, '*Does this mean their intent* that they could make, etc., "*Does this mean their belief* that they could make the enterprise, etc."

It may be that such a statement would have been proper, but the fact still remains that the court did not so state, and that to the lay mind the instruction was nothing more or less than a direction to the jury that such intent and belief did not exist in the minds of the defendants.

Counsel well remembers the feeling of incredulity and amazement that swept over him when he heard that instruction read to the jury. He could not believe that the Court would so flagrantly invade the province of fact, and yet here it was being done. There can be no question but that it had a great and prejudicial effect upon the minds of the jury. This instruction when taken in connection with the instruction assigned as error No. XXVI so far as the defendant Gernert was concerned absolutely denied him a fair trial and a just consideration of his case.

In that instruction the court said:

> "* * * and you further believe from the evidence that some of the false and fraudulent pretenses and promises set out in the indictment were to be used by the defendant for the purposes of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell their stock in such manner and under such false representations were parties to the conspiracy." (Abstract of Record, p. 369.)

Thus the trial court wipes out not only the question of the intent and belief of the defendants, but also *une-*

quivocally informs the jury that the representations and promises set out in the indictment were both false and fraudulent. There could be no clearer invasion of the province of the jury. Nothing of importance is left for them to decide. They are told specifically that the statements made by the defendants were both false and fraudulent, and in addition to that that the defendants were not even clothed with a belief that the enterprise could be made a success and that they intended to make it so.

It will not do for ingenious counsel to split hairs and point out distinctions that are not distinctions. The psychological fact of all trials is that the jury looks to the words of the judge, to his demeanor, to anything which he may say, do, or indicate, for the purpose of finding out what his opinion on the facts is. They realize that counsel for both the defendant and the United States are advocates, who in the heat of conflict lose their sense of proportion, and to whose statements but little heed need be given. The trial judge they consider as a being apart and above any interest in the subject of controversy, and whose opinions are entitled to great weight.

With minds so attuned, can there be any doubt but that the jury seized upon the trial court's statement on those matters as a safe guide to a proper determination of disputed questions of fact.

The thought we wish to convey is ably and succinctly stated in the following case from the United States Supreme Court:

"We think the court should have instructed the jury as requested by counsel for the defendant, and that its refusal to do so was error. Here was a case of very great doubt in the minds of some of the jury. It had deliberated for more than thirty-six hours and been unable to agree upon a verdict. The requests to charge originally made by counsel for defendant had at that time been received as abstract propositions of law, which the court gave in connection with the charge, saying that he was willing to give them inasmuch as they were asked, and as they contained general propositions of law. It does not appear from the bill of exceptions that defendant's counsel then excepted to those remarks by the court, but when the jury subsequently returned into court and announced their inability to agree, counsel for defendant immediately saw the extreme importance of having the requests to charge made to the court regarded by the jury, not as abstract or general propositions of law, but as requests which affected the case then on trial with reference to the facts proved in the case; and so, before the jury again retired, they commenced to propound their requests upon the subject to the court, but the court before listening to them instructed the jury to retire, and then followed the colloquy above set forth between court and counsel.

"Balanced as the case was in the minds of some of the jurors, doubts existing as to the defendant's guilt in the mind of at least one, it was a case where the most extreme care and caution were necessary in

order that the legal rights of the defendant should be preserved. Considering the attitude of the case as it existed when the jury returned into court for further instructions, we think the defendant was entitled, as matter of legal right, to the charge asked for in regard to the previous requests to charge, which had been granted by the court under the circumstances stated, and it was not a matter of discretion whether the jury should, or should not, be charged as to the character of those requests. A slight thing may have turned the balance against the accused under the circumstances shown by the record, and he ought not to have longer remained burdened with the characterization of his requests to charge, made by the court, and when he asked for the assertion by the court of the materiality and validity of those requests which had already been made, the court ought to have granted the request."

BURTON v. UNITED STATES, 196 U. S., p. 283, 306, 307.

THE OVIATT TESTIMONY.

Assignments of Error II and IIa refer to the testimony of the witness N. C. Oviatt. One of the defendants was Thomas Bilyeu, and as to him the court instructed the jury to bring in a verdict of NOT guilty. Over the objection of the defendant Gernert the United States Attorney elicited testimony relative to conversations which the witness claimed to have had with Thomas Bilyeu long before the defendant Gernert was employed by the company, which were to the effect that the basic idea of the selector bar and ejector key idea was the invention of the witness and was stolen from him by Bilyeu, who afterward incorporated it in his patent; the witness was thereupon permitted to demonstrate before the jury a machine which was not even built during the time that the defendant Gernert was working for the Company, *and which had never been exhibited to any of the defendants.* The witness proceeded to tell the jury what he considered to be the advantages which his machine had over that manufactured by the United States Cashier Company, that it was in competition with it, and was even asked whether or not it was in interference with it in the United States patent office.

That this testimony was prejudicial to the defendants can admit of no question. It was offered by the United States upon the theory that they would subsequently connect the defendant Bilyeu with the conspiracy charged in the indictment. This the Government failed to do. This the defendants claimed from the beginning the Government could not and would not do. The de-

fendants objected and claimed that the testimony did not affect them, that they had no knowledge of it, that they should not be bound by it, and that the jury should not consider it.

The court, however, admitted it in evidence and permitted the defendant Gernert an exception to his ruling. Of course when the court allowed a motion for a directed verdict in behalf of the defendant Bilyeu the testimony became absolutely inadmissible for the reason that there was no showing that the facts ever came to the knowledge of any of the defendants whose case was submitted to the jury.

The court never instructed the jury to disregard the testimony, but counsel for the United States urges that no error exists for the reason that the defendant Gernert did not request the court to so instruct.

Counsel cites in support of his contention the case of

Itow vs. U. S., 223 Fed. 25, 28.

That case is not in point, however, for the reason that the testimony remained in the case until it was submitted, and was AT ALL TIMES ADMISSIBLE against the defendant Fushimi. We cannot believe, however, that if the court in that case had found that Fushimi was NOT GUILTY of the crime charged jointly against Itow and himself, the appellate court would have held that to permit the testimony to go to the jury was not prejudicial error.

On this question of what constitutes prejudicial error, the courts of the United States have spoken in terms that admit of no uncertainty.

"The charge made no reference to the robberies committed upon Brinson, Mode and Hall, except as they may have been in the mind of the Court, when it referred to 'these other crimes.' Whatever effect, prejudicial to the defendants, the proof of the robberies upon Brinson, Mode and Hall produced upon the minds of jurors, remained with them, except as it may have been modified by the general statement that the defendants were not to be convicted 'because of the commission of these other crimes.' The only crimes referred to in the charge (other than the alleged murder of Dansby) were the Rigsby and Taylor robberies. The jurors were particularly informed as to the purposes for which the court admitted testimony in respect to those two robberies; but they were left uninstructed, in direct terms, as to the use to which the proof of the Brinson, Mode, and Hall robberies could be put in passing upon the guilt or innocence of the particular crime for which the defendants were indicted. *It is true, as suggested by counsel for the government, that no exception was taken to the charge. But objection was made by the defendants to the evidence as to the Brinson, Mode and Hall robberies, and exception was duly taken to the action of the court in admitting it.* THAT EXCEPTION WAS NOT WAIVED BY A FAILURE TO EXCEPT TO THE CHARGE. If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the pecu-

liar circumstances disclosed by the record, and the specific directions by the court as to the purpose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the Court. But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we

are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

BOYD v. U. S., 142 U. S., 450, 457, 458.

"The court, however, in our judgment, commitmitted a radical error in charging the jury that:

" 'It is incumbent upon the defendant to show that he made these entries in a book prescribed by the internal revenue department, or to show that he made these entries as the law requires, upon a sheet of paper,' etc.

"It is the settled law in criminal procedure that the burden of proof never shifts from the prosecutor to the defendant. It remains throughout with the government. The plea of not guilty is unlike a special plea in civil actions, which, admitting the case averred, seeks to establish substantive grounds of defense. It is a plea that puts in contestation every fact essential to constitute the offense charged. And the benefit of a reasonable doubt in favor of the accused extends to every matter offered in evidence for as well as against him. Glover v. United States, 147 Fed. 426, 77 C. C. A. 450; 1 Greenleaf's Evidence, Par. 74, note; State v. Wingo, 66 Mo. 181,

27 Am. Rep. 329; Commonwealth v. McKie, 1 Gray (Mass.) 61, 65, 61 Am. Dec. 410. It is the rule of law of this jurisdiction, often repeated, that when error is apparent in the record, it was presumptively injurious to the party against whom it was committed, 'unless it appears beyond doubt that the error did not and could not prejudice the rights of the party.' Vicksburg R. R. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 229; National Biscuit Co. v. Nolan, 138 Fed. 9, 70 C. C. A. 436; State v. Russell, 90 Iowa, 569, 58 N. W. 915, 28 L. R. A. 195; People v. N. Y. C. Ry., 29 N. Y. 430; State v. Cooper, 45 Mo. 64.

"Without discussing the question suggested as to whether or not there was sufficient exception saved to this instruction, it is sufficient to say that in a criminal case where a plain error is committed in a matter vital to the defendant, especially in a case like this, where the defendant received the severe punishment of one year and six months in the penitentiary in addition to the fine, it is the province of the appellate Court to correct it. Wiborg v. United States, 163 U. S. 633, 656, 16 Sup. Ct. 1127, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726."

WILLIAMS v. UNITED STATES, 158 Fed. 30, 35, 36.

"The letter, however, was admittedly not in his handwriting, and the government should, therefore, before it can use that which was in itself incompetent as evidence either for the purpose of connecting Young with the commission of the crime or to procure and sustain a verdict against him, establish its case with that degree of certainty necessary to conviction with such letter excluded. This, we think, the government has failed to do. It is true that many circumstances of suspicion surround the petitioner, Young, and he may be guilty; but without the letter which forms the basis of the exception in question, and the answer thereto, and what was done as a consequence thereof, the defendant's guilt is not established with that degree of definiteness and certainty that should be required in a criminal case. *This is particularly true under the federal decisions applicable to the admission and exclusion of evidence, which are to the effect that it should be made to appear beyond a doubt that the improper evidence admitted did not and could not have prejudiced the rights of the party duly objecting.* Deery v. Gray, 5 Wall. 795, 807, 18 L. Ed. 653; Gilmer v. Higley, 110 U. S. 47, 3 Sup. Ct. 471, 28 L. Ed. 62; Boston R. R. Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; U. E. v. Daubner (D. C.) 17 Fed. 793; Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 64 C. C. A. 180, 189, 129, Fed. 668; State v. Mikle, 81 N. C. 552; State v. Massey, 86 N. C. 658, 41 Am. Rep. 478; State v. Jones, 93

N. C. 611; State v. Goodson, 107 N. C. 798, 12 S. E. 329; Bishop New Cr. Proc. Vol. 1, Pars. 89, 92, 93 also 1273, 1274, 1275 and 1276, and cases cited.

"We find ourselves in the position that we cannot say that the admission of the letter in question may not have injuriously affected the defendant Young, nor can we say that the evidence against him, with such letter excluded, is sufficient to sustain the verdict against him."

SPRINKLE ET AL v. UNITED STATES, 150 Fed. 56, 59.

"Every litigant has the legal right to a fair and impartial trial of the issues which his case presents according to the law and the evidence applicable to those issues alone. *The submission to the jury for their consideration of extraneous issues, or of evidence which is neither relevant nor material to the questions upon trial, is a violation of this right, and it constitutes a fatal error,* because it tends to withdraw the attention of the jury from the issues actually involved, and to lead them to decide the case upon false issues, and in that way to reach an erroneous result."

SPARKS V. TERRITORY OF OKLAHOMA, 146 Fed. 371, 373.

"It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed, *but it is contended that the judgments as to the other three defendants should be affirmed because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued.* But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the Court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. *It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions.* The order of consolidation was not authorized by statute and did not rest in mere discretion."

McElroy v. United States, 164 U. S. 76, 80, 81.

Insufficiency of Evidence Against the Defendant Gernert.

GERNERT'S MOTION FOR A DIRECTED VERDICT, AND FOR A NEW TRIAL AND IN ARREST OF JUDGMENT.

As the Court instructed the jury in the case, the defendants must have been knowing participants in the conspiracy. The gist of crime was the alleged scheme to sell worthless stock by means of glittering representations of fact and promises of profits.

At the outset of the case it must be conceded that unless there was *scienter,* or guilty knowledge on the part of the defendant Gernert there could be no conscious participation in the conspiracy, and no intent to defraud.

That was a point which the United States must establish beyond a reasonable doubt and by competent evidence.

The defendant claims that as to that the Government utterly and completely failed. We do not believe that the United States Attorney will make any claim that there is proof tending to prove that.

The Government's case restly solely upon the following testimony:

C. B. Clark testified that in June, 1912, Mr. Gernert made a proposition to him that they could get the Washington agency for the sale of the company's ma-

chines by taking a thousand shares of the capital stock, of which the witness was to take a one-four part. That he afterward made arrangement to buy 100 shares of the stock and paid Gernert $2500 for it, and *received a receipt showing that he had purchased the stock from Gernert.* He testified that Gernert told him that it was company stock and the money was to be used by the company, but that he understood that he and Gernert were afterwards to go into the market and sell it. He ascertained afterward that the stock which he received was from a personal certificate of the defendant Gernert. (Abstract of Record, pp. 149-163.)

Lew Paramore testified that in December, 1911, he purchased 50 shares of stock from Mr. Gernert and that at the time that Gernert told him the stock was treasury stock and that it was being sold to pay off the indebtedness then owing on the patents of something like $50,000.00; that Gernert told him that the company owned all the patents to its machines, that dividends would be paid within the coming year and that he had no doubt but what the dividends would reimburse him for the amount he was paying for the stock, that the company expected to put its change making machines in the street cars at fifteen cents a day and that the profit accruing from that would pay the running expenses of the company. On cross examination, however, he admitted that the receipt given him (Defendant's Exhibit U) showed that he had purchased the stock not from the company but from O. E. Gernert, sales agent and *that the entire conversation he had*

with Gernert was limited to what the machines would do (about which the Government makes no contention).

It appeared that the stock that Paramore purchased was stock that had originally been issued to Mr. Overlin, the company's mechanical engineer, in payment of his salary, and by Overlin transferred to Frank Menefee.

John W. Zufall testified that he purchased ten shares of stock from one W. H. Bilyeu, and afterward saw Gernert and gave Gernert personally a note for the remaining amount of the stock. *Gernert made no representations of any kind to him.* (Abstract of Record, p. 214.)

G. H. Moore testified that in December, 1911, Mr. Gernert with other salesmen came to Leavonworth, Washington, that Gernert demonstrated the machine and informed several persons who came in to see the machine that the money derived from the sale of the stock was to build a factory, equip it with machinery to go ahead and make the machines. (The factory was in fact built, equipped and machines were being manufactured.) The witness bought ten shares of stock and gave his note for it, *which has never been paid.* The stock which Moore purchased and did not pay for came from a certificate which stood in the name of Frank Menefee. *That Gernert did not make any representations to him.* (Abst. of Rec., 216.)

The Government subsequently proved that the company never received any benefit from the transaction, which of course was not unnatural for the reason that Mr. Moore never paid for his stock.

W. A. Decker testified that in December, 1911, he purchased five shares of the stock from a man by the name of Malthouse, who was accompanied by a man named Muraine and someone whom he thinks was the defendant Gernert, but of whose identity he is doubtful. That he was told, but not by Gernert, that they were selling the stock to get money to finish paying off the payments and equip the factory with machinery to go ahead. That Muraine told him the Company would be paying dividends within two years. The receipt which he received shows that the third man was not Gernert but one Bilyeu. The witness further testified that he bought the stock on his faith in the machine and what it could do, and knew that the matter of paying dividends depended entirely upon creating a market for the machines and other elements. On cross examination the witness admitted that Gernert was not present when the representations were made to him relative to the stock.

Dr. C. R. Zener testified that he bought twenty-five shares of stock from one P. E. Muraine, and that Muraine (who was not on trial) told him that the money from the sale of the stock was to be used for the purpose of financing the building of the factory, installing machines, etc. *He did not testify to ever having seen Mr. Gernert.*

The Government subsequently proved that Dr. Zener's stock came from a certificate which stood in the name of Frank Menefee.

Mrs. Ollie B. Howard testified that in May, 1913, she had a conversation with Mr. Gernert in which Gernert claimed to be seeking a position as stock salesman in her company, the Swiss-American Milk and Chocolate Company, and informed her that he had trade his stock for $100,000 in property and for a large sum of cash, that he further told her what it cost him for taxicabs, that he would ride them about the city, wine and dine them, and afterward in the "wee sma' hours of the morning" he would sign them up for the stock.

On cross examination she testified that Gernert thereupon was employed by the Swiss-American Milk and Chocolate Company and was Assistant Sales Manager of the Company, but admitted the execution of a affidavit to the effect that Mr. Gernert had never been an officer or employee of that company, that they had endeavored to secure his services, had printed his name on their stationery but had failed to obtain his services.

It was a remarkable fact, however, that the Government did not adduce any witnesses who had been induced to purchase stock as Mr. Howard claimed was the case, and that the books of the company revealed that the entire amount of salary, commission and traveling expenses which the defendant Gernert received from May, 1910, to the date of his severance from the company was some $8,000.00.

C. F. L. Smith testified that he had a talk with Mr. Gernert about the company's machines; that Gernert told him what other companies had made with such propositions; gave him assurances that the United States

Cashier Company was as good as they, and that the company would more than likely pay large dividends in the near future and that he thought the stock would raise to $100.00 per share.

Harry Wainright testified as to certain statements which were made to him by O. L. Hopson, not in Mr. Gernert's hearing or presence. That afterwards he saw Mr. Gernert several times and Mr. Gernert told him that he thought the company would have its machines on the market in 1912, the latter part of the year. That Gernert never told him anything about the patents.

Elmer C. Townsend testified that in October, 1911, he purchased twenty-five shares of stock from P. E. Muraine, that Muraine told him has was an agent of the Cashier Company, that the company had large orders for the sale of the machines and that Meier and Frank had an order for five hundred machines. *That Mr. Gernert was not present when Mr. Muraine made the representations,* but that he afterward met Mr. Gernert and gave Gernert a mortgage and later a deed to some lots in payment of the stock.

The Government later offered proof that the Townsend stock was issued from a certificate which stood in the name of Frank Menefee. It is not claimed, however, that any representation was made to Mr. Townsend that the stock was treasury stock.

This constitutes all of the oral evidence offered during a six weeks' trial against this defendant. The Government, however, offered the following documentary proof:

1st. That the stock sold to the witness as heretofore mentioned during December, 1911, was sold under an arrangement with Gernert that the proceeds of the sales should be accounted for by Menefee, LeMonn and Gernert each turning in one-third of their own certificates of stock.

2nd. That Gernert had not informed his associates that the stock being sold during that trip was personal stock.

There was nothing offered however to show that Gernert did in fact turn in any certificates on his account.

The United States further offered proof to the effect that on February 24, 1912, the defendant Gernert wrote to LeMonn asking him to send him a letter containing the following statements:

1. A promise to give a place on the Advisory Board to a representative of a syndicate which should purchase $35,000 of stock of the corporation.

2. That he, LeMonn, would do his utmost to help Gernert get that 1000 machines for his, Gernert's, territory, machines Gernert wanted for his territory.

3. To say in a joking way that he never knew there were so many banks in the country as the letters show which are coming in daily asking about machines.

4. Also to state that one of the directors stated at luncheon the other day that they are figuring to keep

the wheels running 24 hours a day, 3-8 hour shifts in order to supply the great demand that he (Gernert) knows there is for our new born toy.

5. Also to state that the other two agencies are almost through with stock selling and if Gernert wanted to let them have what he had to sell to let LeMonn know, but that personally he would not do as it would mean that Gernert would have to lie idle for a month or two until the machines were ready.

LeMonn sent the reply that Gernert requested, practically word for word. There was no evidence however that Gernert exhibited the letter to anyone, or that he sold any stock of any kind whatsoever in California.

The foregoing constitutes all the evidence against the defendant Gernert, and is stated as strongly against him as the testimony warrants. We propose now to discuss for a little space the information which the company furnished Gernert relative to these representations which he made.

Early during the year 1911, the defendant Gernert was advised by the company of the following:

a. That the U. S. Cashier Company was the owner of the absolute rights in the United States for the manufacture and sale of Potter Cashier.

b. That in July, 1910, the Company purchased the American Cash Record Co. and obtained the sole rights of manufacture and sale of the Bilyeu Cashier.

c. That the Company was able to begin a manufacturing operations in a small way in the fall of 1910,

had turned out several of the Bilyeu Cashiers, that they have been thoroughly tested and are performing their work accurately and faithfully.

d. That the Company would be able to manufacture not only the Bilyeu Cashier but also other models from the same basic patent, together with a combined cash register and coin paying machine.

e. That the company had in its employ two of the most able mechanical engineers, *who had either patented or greatly aided in the perfecting of the different models.*

f. That the company had closed a deal for a large tract of real estate at Kenton which will serve as a site for a factory.

g. *That the company believed that it would be able to turn out machines in commercial quantities within six to eight months.* (Govt. Exhibit 248.)

On March 6, 1911, the Company advised Gernert that the stock would advance in price within a few days, but that such advance would not take place until it had gotten started toward building the new factory which they anticipated would be about the 15th of the month. (Govt. Exhibit 124.)

On May 29, 1911, the Company advised Gernert that the Board of Directors had ordered the price of stock advanced to not less than $15.00 a share, and that the advance was justified from the following facts:

A. That the Company had developed the lightning change maker, and was demonstrating a section of the

computing machine, which development fully double the assets of the Company from a mechancial standpoint.

B. That they had let a contract for the erection of the first unit or section of the permanent factory, that the plans were perfected, and that ground would be broken a few days.

C. That the progress made towards establishing a Canadian factory had been so satisfactory that the success of it was assured.

D. That the Company had orderd several thousand dollars worth of machinery and had negotiations pending for machinery in a plant already established, which with the machinery already on hand would place the Company in the position to begin the active manufacture of machines in commercial quantities and that the making of dies and special tools will be carried on simultaneously with the construction of the factory.

E. That in addition to real estate the Company had in cash and bills receivable about $110,000 which is ample to build and equip the factory, and that the remaining block of 5000 shares would be for a manufacturing fund.

(Government Exhibit 125.)

On June 5, 1911, the Company informed the defendant Gernert that the demand for machines was becoming so great that the board of directors had purchased an entire manufacturing plant that was in first class running shape. (Govt. Ex. 298.)

On June 19, 1911, the Company informed Gernert that it had purchased and paid for in full the entire manufacturing plant of the Gnu Copyholder Co. and that with this additional machinery the Company was now fully equipped to finish making the special tools and dies and ready to begin manufacturing in a commercial way and the Company will be enabled to take orders and make deliveries of the lightning change makers in thirty to sixty days and the Bilyeu Automatic Cashier in 90 to 120 days. (Govt. Ex. 128.)

On June 10, 1911, the Company wrote Gernert that their factory was running in good shape and that it was able to turn out on the average of about one lightning change maker per day and will be able to rapidly increase the showing from month to month and that it would not be long until the Company would be making machines in commercial quantities. (Govt. Ex. 251.)

On September 18, 1911, the Company informed the defendant that it had sold enough stock and that it had had sufficient assets to take care of factory, equipment and manufacturing fund, and that the balance of stock now for sale is the patent stock. (Deft. Ex. U.)

On November 10, 1911, the Company wrote Gernert that he had been with them long enough to know that if the stock was ever worth $10 per share, when the Company had nothing but the cashier machine, that it is worth $50 a share at this time when he considered the evolution of the machine into so many different and valuable devices. That admitting that the Bilyeu Cashier is a valuable asset to the Company and a big

dividend payer, the fact remains that every time it had a sale for the automatic cashier for banks or payrolls, it had beyond question of a doubt ten or twenty sales for its automatic change and computing machine, and this will sell at a higher price than the automatic cashier, the gross profits on the same will be correspondingly greater, hence these new machines the Company had brought out mean that it should earn five or ten times the profit what was ever possible with the first and only machine the automatic cashier. That the new factory in Kenton was in actual operation, and that it would be able to turn out some machines for the trade not later than January 1st, 1912, that the mechanical department had been given orders to rush work so that deliveries could be made in January without fail. (Deft. Ex. U.)

On December 20, 1911, the president of the Company wrote Gernert that the stock selling was so closely wound up that he intended to switch everything to resales as rapidly as it could be arranged. (Deft. Ex. U.)

On the same day another letter was addressed to defendant informing that the condition of the Company was certainly without parallel in any new corporation or manufacturing industry ever attempted in the West. That the Company has been financed in less time than any other on record for a like amount of money and it certainly could not be questioned that the Company had made wonderful progress in the way of building and equipping a factory and developing and constructing different classes of machines, to say nothing of the im-

provements on the wonderful automatic cashier, *which it will be able to deliver to the trade in February* (1912). (Govt. Ex. 157.)

On February 6, 1912, the following information was transmitted by the Company to the defendant Gernert: Our first commercial machine will be ready before the close of this month, which means that we are now practically starting on the sale and delivery of our machines. *We are almost daily in receipt of unsolicited orders for these wonderful time and labor saving devices,* and as previously advised I know from personal investigation on my recent month's trip to the Atlantic Coast that many of the largest corporations, such as the National Cash Register, Oliver Plow works, South Bend; West Lumber Co., Chicago; Baldwin Locomotive Works, Philadelphia, etc., etc., are making up their payrolls exclusively in coin, which proves that we have an unlimited market waiting us. *We are working overtime in our factory, and even with this pressure will not be able to catch up with the present orders or make deliveries of any new ones before July or August.* (Deft. Exhibit U.)

On February 19, 1912, a letter was written to Gernert advising him as follows: We have two syndicates now under way for $25,000 each and if these come through it will mean an advance to $50.00 thirty days earlier than we have anticipated and everything looks favorable that it is an even chance for these syndicates materializing. (Deft. Ex. U.)

The following statements were given to the salesmen for transmission to prospective purchasers of stock. (Defts. Ex. U.):

Automatic Cashier.

Probable sale of machines with net earnings at $200 per machine.

First year.	Second year.	Third year.
250 per month.	375 per month.	500 per month.
3000 per year.	4500 per year.	6000 per year.

Net earnings.

First year.		Second year.		Third year.	
$600,000	100%	$900,000	150%	$1,200,000	200%

In addition to the foregoing the Company had published and distributed a facsimile copy of a letter from John F. Robb, Patent Attorney, to the effect that the Bilyeu patents were unquestioned, and that they controlled the art.

In view of the admitted facts in the case, how can it be claimed that the defendant Gernert ever was a party to any conspiracy to violate section 215 of the Penal Code. Not only has the government failed to bring any proof that he knew or suspected the existence of the matters which were only known to the president, board of directors and manager of the Company and which made the stock worthless, but *the record affirmatively discloses that he was informed time and time again that the Company was in truth and in fact a manufacturing enterprise which had possibilities of growth and*

enrichment that quite equalled the record of the great manufacturing enterprises of the East and Middle West.

The position of the Government is that knowledge of all of these facts must be inferred from the testimony that on three isolated occasions the defendant sold stock to persons upon a representation that the same was Company stock when in truth and in fact it was his own personal stock.

That inference however cannot be drawn from the facts so testified to.

The United States Attorney asks this court to infer from the fact of that isolated misrepresentation that it was made with fraudulent intent; then from the inference that it was made with fraudulent intent, we are asked to infer that he must have known the facts relative to the patents, to the factory, to the manufacture and sale of the machines, to financial condition of the Company, and to the false financial statements, and finally we must pile inference upon inference and infer that beyond a reasonable doubt the defendant Gernert conspired with the various defendants named in the indictment, some of whom he had never seen, met or corresponded with, to violate section 215 of the Penal Code.

Such a course is undoubtedly without the sanction of any court of law and violates every sense of justice and fair dealing. A man entirely innocent of any crime might by this ingenious process be convicted of complicity with the most horrible violation of law.

Let me give an illustration of the vice of the Government's contention.

A is the president of a corporation which is perfectly solvent, which is and has been paying large and certain dividends, whose stock is worth beyond any question two dollars for every dollar invested. For private reasons, entirely divorced from the affairs of the corporation, it becomes necessary for A to raise money, and his only resource is to sell a portion of the stock he owns. He goes to B. He fears that if he tells B that the stock is his, A's personal stock, B will become suspicious of the value of the stock and will refuse to purchase the same, although A believes and it is the fact that it is worth more than the price A asks for it. A therefore represents to B that the company has some of its treasury stock that is for sale and that it would be a good investment for B. Upon this misrepresentation B relies and purchases the stock. He is not defrauded, it is worth all he paid for it, and all that he expected it would be worth, and A had no intention to defraud him although he lied to him.

Would any court or any jury ever hold under such circumstances that there was any fraudulent intent, or that A was guilty of a crime? Unquestionably not. Yet, if the position of the Government is correct such would be the decision, and so the lower court held in overruling the motion of the defendant Gernert for a directed verdict and in giving the instruction which is assigned as the XXVI error.

This matter of drawing inference upon inference has received the consideration of the United States Supreme Court in the following cases:

"No direct proof of such receipt was offered, as we have said. None was attempted. The defendant might have resorted to a *subpoena duces tecum* or to an order of the court to produce papers and books, or, perhaps, to a bill of discovery. He did neither. He simply proved, as a fact, that there were life policies in existence, secured through his agency, renewal premiums upon which stopped there, and he now complains that the jury was not allowed to presume from that fact that the renewal premiums had been paid to the plaintiff, and to presume it against a party who was not in the wrong, a party who had rightfully dismissed him from his agency, and who was under no obligation to collect the premiums at all. But was that a conclusion which the jury should have been permitted to draw from the fact proved? It is error to submit to a jury to find a fact of which there is no competent evidence. From the fact that a debt existed, it does not follow as a necessary or even reasonable sequence that it has been paid. Nor is there any presumption of its payment upon which a jury can act. Certainly none until after the lapse of twenty years. Much less can such a presumption arise in regard to the payment of renewal premiums upon policies of insurance such premiums not being debts due to the insurers, and not being collectible as debts. We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved. But the presumed fact must have an im-

mediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proved. Remarking upon this subject in United States vs. Ross (92 U. S. 281, 284) we said: *'Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves be presumed.'* Referring to the rule laid down in Starkie on Evidence, page 80, we added: 'It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open and visible connection between the principal or evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best on Ev. 95. A presumption which a jury may make is not a circumstance in proof, and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption. Douglass v. Mitchell, 35 Pa. St. 440.' * * *

"What the evidence did prove was, that there were policies in force on the 2d of June, 1871, the annual premiums upon which were $87,000; that he would be entitled to commissions upon renewals of the policies, if they should be thereafter renewed, and if the renewal premiums should be paid to the

company, and that these premiums were to be collected by his sub-agents and paid over by them. These were the primary facts. Everything more was left to presumption. The jury, therefore, were to presume that the policies did not lapse, and that they were renewed. Built on this presumption was another, namely, that the renewal premiums were paid to the agents, and upon this a further presumption, that the premiums had been paid over by the agents to the company, or had been immediately collected by it. This appears to us to have been quite inadmissible. A verdict of a jury found upon such evidence would have been a mere guess. The evidence of fact did not go far enough. We think, therefore, the court was not in error in withdrawing it from the consideration of the jury."

MANNING vs. INSURANCE CO., 100 U. S. 693, 697.

UNITED STATES vs. ROSS, 92 U. S. 281, 284.

The gist of the fraudulent scheme was that the defendants were to sell worthless stock. Unless the stock was worthless, or of little value compared with the price at which it sold, and UNLESS THE DEFENDANT GERNERT KNEW OR SUSPECTED THAT FACT, then as to him, the United States Cashier Company was not fraudulent and he could not be a member of a conspiracy. The question of his knowledge of the worthlessness of the stock is itself a inference which must be

drawn from evidence tending to show that the matters which the Government claims rendered it worthless were known to Gernert. *There is no proof that Gernert even suspected such a condition.*

Therefore there was nothing to be submitted to the jury and the Court should have instructed them to find a verdict of not guilty as to this appellant.

CRIMINAL INTENT.

The trial court entirely overlooked the matter of the criminal intent which must exist in the mind of the defendant before he may be said to be guilty of the crime charged. A well considered decision on that question is the following:

> "The court was also requested by the defendant's counsel to charge that 'unless the jury find that the acts charged were committed with criminal intent, the defendant is entitled to an acquittal.' The court replied, 'I charge you unless the act was committed with intent to defraud, as I explained it to you, the defendant is entitled to an acquittal. I refuse to charge as requested.' To this ruling an exception was taken by the defendant. During the summing up of the defendant's counsel the judge was asked how he would charge upon the subject of criminal intent, and he replied: 'I shall charge that the jury must find that there was intent to defraud; nothing about criminal intent.' In the charge the Judge instructed the jury that there must be an intent to defraud in order to constitute the crime of forgery, and then defined the term, defraud, 'to deprive of right, either by obtaining something by deception or artifice, or by taking something wrongfully, without the knowledge or consent of the owner.'
>
> "Criminal intent is essential to constitute the crime, and the testimony bearing thereon is always a question for the jury. (Duffy v. People, 26

N. Y. 588-593; Stakes v. People, 53 N. Y. 164; People v. Powell, 63 N. Y. 88; People v. Plack, 125 N. Y. 324.)

"It follows that the Court should have charged as requested. It is urged, however, that the refusal to so charge did no harm, and that the charge as made sufficiently covered the ground. But we are of the opinion that the charge as made, taken in connection with the remarks of the court and its refusal to charge as requested, was confusing, and rendered uncertain the question as to whether 'criminal intent' was or was not essential in order to constitute the crime."

PEOPLE v. WIMAN, 148 N. Y. 29, 32, 33.

"During the charge the court charged the jury in respect to the meaning of the word 'defraud' as follows: 'Defraud has been defined as follows: To deprive of right either by obtaining something by deception or artifice, or by taking something wrongfully without the knowledge or consent of the owner, and I think that is as good a definition of defraud as I know of.'

"*It will be at once seen that this definition is fatally defective so far as it relates to criminal proceedings, as the last branch of the proposition takes no cognizance whatever of the question of intent.* The jury were by this definition in effect charged that if Wiman wrongfully took without the knowl-

edge or consent of Dun the money in question, although he may have believed that he had the right to take the money, he was guilty of the intent to defraud required by the statute, thus, as has been intimated, eliminating the one element which it has been repeatedly held must be present, namely, the criminal intent.

"It is undoubtedly true that in order to constitute a crime, the doing of the act prohibited with the intent to do the act is sufficient, although the party may not be aware of the fact that he is transgressing the law. *But there is no possibility of an act of fraud being committed without a fraudulent intent. THE WORD 'FRAUD' IMPORTS GUILTY KNOWLEDGE.* A man supposing that he has a right to property and taking it without the knowledge or consent of the owner, would, under this definition, be held to be defrauding the owner if it should subsequently turn out that his supposed right was without foundation. In order that there should be no mistake upon this point, the court subsequent to the giving of this definition expressly charged the jury that the question for them to determine was: 'Did he write the name of Bullinger on the back of that check with intent to get this money from the firm that he had no right to take and apply it to his own purposes?' No question of criminal intent was submitted, the only question of intent submitted being an intent to do an act which was not by any means of necessity criminal. Even if Wiman believed he had the right

to take this money because of the course of previous dealings, the jury were instructed that if he took it intending to take it, he was guilty of an intent to defraud. An intent to defraud would seem to involve some moral turpitude, but under this instruction a mistake as to property rights is, of itself, sufficient to justify a finding of fraud. This is carrying the definition of 'fraud' much further than has yet been done. We think that in thus instructing the jury the question of criminal intent was entirely eliminated, and under these circumstances the refusal of the request to charge was error."

PEOPLE v. WIMAN, 92 Sup. Ct. 320, 330, 331, 332.

Under the facts as disclosed by the record, and under the law as clearly laid down by the decisions cited, there can be no doubt that the United States failed to adduce facts sufficient to sustain a conviction. In addition to the positive evidence in his favor, the defendant was and is entitled to have his acts considered upon the hypothesis that he was innocent, and to have the presumption of innocence abide by and follow him throughout the case until it was removed by proof beyond a reasonable doubt.

Such being the case it was the duty of the trial court to direct the jury to find the defendant Gernert not guilty. It was error for the court to fail so to do.

"To establish the connection of any one of the defendants with the conspiracy, such connection must be shown by facts and circumstances, or by his own acts, conduct or declarations, independent of the declarations of others, and, until this fact is thus established, he is not bound by the declarations or statements of others. * * *.

"I have stated to you that the offense may be established by circumstantial evidence; but circumstantial evidence, to warrant a conviction in a criminal case, must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant, or, in other words, the facts proved must all be consistent with and point to the guilt only, and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proven, and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or with guilt, the law requires that the defendant be given the benefit of the doubt, and that the theory of innocence be adopted."

U. S. v. RICHARDS, et al., 149 Fed. 433 (452, 454.)

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyound a reasonable doubt. The burden was upon the government to make this proof, and

evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt. it is the duty of the appellate court to reverse a judgment of conviction. Vernon v. United States, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550; United States v. Richards (D. C.) 149 Fed. 443, 454; Hayes v. U. S. (C. C. A.) 169 Fed. 101, 103; United States v. Hart (D. C.) 78 Fed. 868; 873, affirmed in Hart v. United States, 84 Fed. 826, 827, 828; United States v. Martin, 26 Fed. Cas. 1183 (No. 15,731); People v. Ward, 105 Cal. 335, 341, 38 Pac. 945; People v. Murray, 41 Cal. 66, 67; State v. Hunter, 50 Kas. 302, 32 Pac. 37; Bradshaw v. State, 17 Neb. 147, 22 N. W. 361, 366."

UNION PAC. COAL CO. v. U. S., 173 Fed. 737, 740.

"In a criminal cause, where the evidence for the government, if assumed to be true in fact, together with all reasonable inferences from it, is not legally sufficient to support a verdict of guilty, it is the duty of the trial court, upon being moved thereto, to direct a verdict of not guilty. Crumpton v. United States, 138 U. S. 361, 363, 11 Sup. Ct.

355, 34 L. Ed. 958; France v. U. S., 164 U. S. 676, 681, 17 Sup. Ct. 219, 41 L. Ed. 595. In the record in this case we find no evidence that the bottle in question was refilled by the defendant, or by his procurement, or by any one acting for him. The learned court below was therefore in error in refusing the instruction asked for. The judgment must, therefore, be reversed, and the case remanded for a new trial."

DUFF v. UNITED STATES, 185 Fed. 101, 102.

IN CONCLUSION.

At the outset of this brief we informed Your Honors that not only was there prejudicial, reversible error in the proceedings in the court below, but that the defendant had been unjustly accused and wrongfully convicted.

His interests and his liberties were overwhelmed by the mass of evidence of the misdeeds of others. He asked for a separate trial, it was opposed by the Government, and the Court declined to grant it. That he was entitled to a separate trial we believe all fair-minded persons will now agree. There could and would be no conviction of the defendant in a case which depended upon proof of what he himself did, and it was only when the mind of the jury became inflamed with resentment over the fraud practiced by the managing officers of the corporation, over their concealment of discouraging facts, over their misrepresentations of existing conditions, and over their cool disregard of the interests of their investors, that they became enraged with every one who had any connection with the company, no matter in what humble and minor degree.

They forgot, just as the United States Attorney has forgotten, that the defendant Gernert was as much deceived by the false and specious claims of the President and Sales Manager of the corporation as were the investing public, and that the revelation of the hidden chapters of the history of the United States Cashier Company were as astounding to him as it was to the jury.

The United States Attorney proved his case by proving everyone of the allegations of his indictment against the defendant Frank Menefee, Oscar A. Campbell, Bonnewell, Todd and LeMonn, but he totally failed as to O. E. Gernert.

The Government may well contend in their cases that notwithstanding error on the part of the trial court, yet the overwhelming mass of testimony demonstrates that those defendants were in truth and in fact conspirators, that they knew that the article they were selling to the public was a glittering sham, that there were no patents, that there was no market, that the company was on the rocks of insolvency, and that those who blinded by their promises invested their money would lose every penny of it. That therefore those defendants shall not be heard to claim a technical error on the part of the Court, and that they shall not go unwhipped of justice.

The charges which were true as to his co-defendants are false so far as he is concerned. The errors of the court which we complain went directly and vitally to his particular case, and without question contributed materially to the judgment of conviction which was entered against him.

We are aware that where conflicting deductions may fairly be drawn from the same facts that appellate courts will not undertake to reverse convictions, but in this case the only fair inference from the evidence is that the defendant Gernert was not guilty.

The appellant is a young man, practically all of his life lies ahead of him, and he has impoverished himself to submit his case to Your Honors sustained by the knowledge that he has been wrongfully accused, and firm in the belief that justice will be meted out to him in this Court, and that the judgment of the Court below will be reversed.

Respectfully submitted,

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